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JOINT APPENDIX.

(U. S. C. A.—7 Filed Dec 2—1957
Kenneth J. Carrick Clerk)

United States of America,
Plaintiff

vs.

93.970 Acres of Land, etc.
• • •
Illinois Aircraft Services and Sales Company, Incorporated,
Defendant.

54 C 1468
12191
12192

Attorneys for Plaintiff: -Appellant-Appellee
R. Tieken, U. S. Atty.
L. D. Swanstrom, Ass't. U. S. Atty.

For Ill. A. S. & S. Co., Inc.* Appellee: -Appellant:
James L. O'Keefe
33 South Clark Street
Chicago 3, Illinois
George W. Lennon
231 South LaSalle La Salle Street
Chicago 4, Illinois
Leonard R. Hartenfeld
33 S. Clark Street
Chicago 3, Illinois
James F. Ashenden, Jr.
33 South Clark Street
Chicago 3, Illinois

Notice of Appeal filed by Plaintiff 9-4-57
By Defendant 9-5-57

*Illinois Aircraft Service and Sales Company, Incorporated

JUDGE PERRY
CIVIL CALENDAR 54 C 1468
DOCKET

Title of Case
United States of America,
Plaintiff
vs.
93.970 Acres of Land, More or Less, Situate in Cook County, State of Illinois, Illinois Aircraft Services and Sales Company, Incorporated,
Defendant

Basis of action: Land Condemnation

Attorneys:
For Plaintiff:
Robert Tieken, U. S. Atty.
(See Preceding Page for Attys. on Appeal)

For Defendant: Ill. Aircraft Services & Sales Co.)
George W. Lennon
231 S. LaSalle St.
James L. O'Keefe
Leonard R. Hartenfeld
James F. Ashenden, Jr.
33 S. Clark Street (3)
An-3-3300
J. Herzl Segal
One N. LaSalle St.
(For Ill. Aircraft Services & Sales
James A. Harrington
One N. LaSalle St.

Date	Defendant's Account	Received	Disbursed
9- 5-57	Leonard R. Hartenfeld		
	Notice of Appeal	5 00	
9- 9-57	Treas C D—67		5 00

54 C 1468

Date	Filings—Proceedings Amount Reported in Emolument Returns
10- 6-54	Filed Complaint—Condemnation (3) (Exs) (JS-5) g 15.00
10- 7-54	Issued c.c. of record to date hereof except appearance filed 10-6-54 H 2.20
10- 6-54	Filed appearance of Illinois Aircraft Services and Sales Co. and Attys
10- 6-54	Filed Motion For Order For Delivery of Possession (1)
10- 6-54	Ent. Order for delivery of possession of property to plaintiff immediately Draft—Perry, J Mld ntcs 10-8-54
10-18-54	Filed Answer of Illinois Aircraft Services and Sales Co., Inc. (7) P
11- 4-54	Filed Notice, Motion & Affidavit (6)
11- 5-54	Mo. to vacate order of 10/6/54 taken under advisement, briefs 10 & 5 days. Oral argt Nov. 26. 54 at 2 P.M. Enter order staying possession until 1-1-55. Perry—J
11- 5-54	Ord. leave to file inst. pltff's motion to strike deft's answer & sup. brf—10 days deft to file ans. brief, set for hrg Nov. 26, 1954 at 2 P.M. Perry-J Mld notices 11-9-54
11- 5-54	Filed Motion to strike ans. of defendant
11- 5-54	Filed brief in support of mo. by the Government to strike the ans. of deft. (8)
11-26-54	Hearing held on deft's motion to vacate order of Oct. 6, 1954 and pltf's motion to strike deft's answer—advisement under Rule 7—Perry, J. Mld ntcs 11-30-54 H
1- 4-55	Govt's motion to strike answer of defts denied—Perry, J. Mld ntcs 1-5-55 H

2- 25-55 Ord. cs. to be added to list of cases awaiting trial April 25, 1955—Perry J.
Mld. notices 3-4-55. P

9-17-56 Ord cause set for pre-tr conf. at 1:45 P.M. 10-4-56.—Jerry J.
Mailed notices 9-20-56 I

11- 5-56 Pre trial conference held. Govts motion for summary judgment denied. Order set for trial 1-2-1957.—Perry J.
Mld ntcs 11-7-56 a

2-18-57 On motion of Deft. order trial contd to 3-11-57. —Perry, J. a
Mld Ntcs 2-20-57

3- 8-57 By agreement order cause reset for trial from March 11, 1957 to April 8, 1957—Perry—j

3-12-57 Mld. Ntc. m/s

4- 3-57 Filed Notice (2)

4 -3-57 Mo for lv to fl appearance gr. Mo for ord on govt to produce records pur to Rule 34 cont'd to 4-8-57. Jerry, J.
Mld ntcs 4-5-57

4- 3-57 Fld appearance t

4- 3-57 Filed Motion. (2)

4- 8-57 Motion deft for production of documents withdrawn. Jury selected and sworn. Order Jury to view site in quest, and to separate until 4-9-57.—Perry J.
Mld ntcs. 4-11-57 I

4- 9-57 Opening statements heard—Evidence heard in part for Government and Jury to separate until April 10, 1957—Perry—J. m/s
Mld. Ntc. 4-12-57 m/s

4-10-57 Further evid. heard for the Govt. and Govt rests. Evid. heard in part for deft. and jury to separate until 4-11-57. —Perry, J.
Mld. Ntcs. 4-16-57 E

4-11-57 Further evid. heard for deft. and defts. rests. Jury to separate until 4-12-57.—Perry, J.
Mld. Ntcs. 4-16-57

4-12-57 Rebuttal evid. heard and both sides rest. Jury to separate until 11:00 A.M. 4-15-57.—Perry, J.
Mld. Ntcs 4-16-57 E

4-12-57 Filed Notice for the production of original correspondence and documents (3 E

4-15-57 Mo. of Govt. for a directed verdict of No Dollars & No Cents, denied. Final Argts heard. The Court instructs the Jury. Marshal sworn. Jury retires to consider its verdict. Jury to sign, seal & separate.—Perry J. Draft (1)
Mld ntcs. 4-16-57 I

4-16-57 Filed Verdict. (1)

4-16-57 Sealed Verdict Opened. "We, the Jury, find that the just compensation which should be paid for the taking of the leasehold herein is $25,000.00". Judgment on the verdict.—Perry J. (JS6)
Mld ntcs. 4-16-57 I

4-22-57 Enter order govt's mo. for judgment notwithstanding the verdict entered and contd to 4-24-57. —Perry. J.
Mld. Ntcs. 4-24-57 E

4-22-57 Filed Notice(2) E

4-22-57 Filed Motion for Judgment notwithstanding the verdict (1)

4-24-57 Govt's motion for judgment n.o.v. the verdict denied. Perry, J.
Mld ntcs 4-24-57 t

4-24-57 Filed Notice and Motion (2)(2)

4-24-57 Filed Brief in support of motion for additur (4)

4-24-57 Filed Brief in Support of Motion (3)

4-24-57 Filed Deft's Motion for additur or in the alternative for a new trial (2)

4-24-57 Enter order Defts motion to amend judgment to include interest from date taking—advisement. Defts motion to increase award by an additur advisement.—Perry, J. E
Mld. Ntcs. 4-26-57 m/s

7- 9-57 Enter supp. findings of fact & conclusion of law. Draft (2)
Enter amended judgment. Order claimant-defendant recover of plaintiff $75,000.00 with interest of $10,375.02. Draft (2) Perry, J.
Mld ntcs 7-10-57 t

9- 5-57 Fld Bond on Appeal. (1) a

9- 4-57 Filed Notice of Appeal of Plaintiff (1) 5 00 US

9- 4-57 Mailed copies of notice of appeal to attys.

9- 5-57 Filed Notice of Appeal of Defendant Illinois Aircraft Services and Sales Company, Inc. 5 00 I

9- 6-57 Mailed copy of notice of appeal to U. S. Atty. B

9-19-57 Filed Statement required by Rule 12(d) of the Rules of U.S.C.A. 7th Cir. of appellee (1)B

9-30-57 Enter order motion to extend time for docketing record on Appeal. Draft (1) T
Mld. notices. 10-1-57

10- 3-57 Clerk's File copy of transcript of proceedings had before the honorable J. Sam Perry, Judge on April 8, 9, 19, 11, and 15, 1957 and transcript of certain proceedings (before the voir dire examination of the jury) on April 8, 1957, filed by the official court reporter—three volumes—(Vol. 1-(279) II-(321); & 1-A to 1-Q) B

10-23-57 Enter order extending time to docket appeal for 90 days from 9-4-57—Draft—Perry, J.
Mailed Notice to Attys. 10-23-57 B

11-18-57 Filed Plaintiff's exhibits 1, 2, 4, 5, (6 & 7 refused) B

United States of America }
Northern District of Illinois } ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy of the original Docket entries, to and including November 18, 1957, in the cause entitled: United States of America, Plaintiff vs. 93.970 Acres of land, etc., • • • Illinois Aircraft Services and Sales Company, Incorporated, Defendant, No. 54 C 1468, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois this 22nd day of November, A. D. 1957.

Roy H. Johnson

Clerk.

By /s/ Gizella Butcher

Deputy Clerk.

(Seal)

1

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

United States of America, Plaintiff vs. 93.970 Acres of Land, More or Less, Situate in Cook County, State of Illinois, and Illinois Aircraft Services and Sales Co., Inc., Defendant	Civil Action No. 54 C 1468

STATEMENT PURSUANT TO RULE 12(c)

1. The caption of the case is as follows: United States of America vs. 93.970 Acres of Land, More or Less, Situate in Cook County, State of Illinois, and Illinois Aircraft Services and Sales Co., Inc.
2. Complaint was filed on 10-6-54. On the same date an order was entered directing delivery of possession of the property to the plaintiff.
3. On October 18, 1954, Illinois Aircraft Services and Sales Company, Inc., filed its Answer.
4. On 11-5-54 motion to vacate the order of 10-6-54 was taken under advisement. On the same date, 11-5-54, the plaintiff filed its motion to strike the defendant's answer.
5. On 1-4-55 the government's motion to strike the answer of the defendant was denied.
6. On 11-5-56 the government's motion for summary judgment was denied.
7. Trial of the cause was had beginning on 4-9-57 and concluded on 4-16-57 before the Honorable J. Sam Perry.

8. On 4-16-57, the jury entered a verdict finding just compensation in the sum of $25,000.00. Judgment was entered on the verdict the same day.
9. On 4-22-57 the government filed its motion for judgment notwithstanding the verdict, which was denied on 4-24-57.
10. On 4-24-57 the defendant filed its motion for an additur, or in the alternative for a new trial.
11. On 7-9-57 the court entered supplemental findings of fact and conclusions of law, and amended the judgment by increasing it to $75,000.00, with interest of $10,375.02.

2

12. On 4-15-57 the government filed its motion for a directed verdict of no dollars and no cents, which was denied that date.
13. On 9-4-57 the government filed its notice of appeal, and on 9-5-57 the defendant Illinois Aircraft Services and Sales Co., Inc., filed its notice of appeal.

/s/ R. Tieken
/s/ R. Tieken
United States Attorney
/s/ Leonard R. Hartenfeld
Counsel for defendant.

4

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 54 C 1468) • •

COMPLAINT—CONDEMNATION
(Filed Oct 6 1954)

This is an action of a civil nature brought by the United States of America, at the request of the Secretary

of the Army of the United States for the taking of property under power of eminent domain and for the ascertainment and award of just compensation, if any, to the party in interest.

2. The authority for the taking is the Act of Congress approved August 1, 1888 (25 Stat. 357; 40 U.S.C. 257), and the Act of Congress approved August 18, 1890 (26 Stat. 316) as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), and April 11, 1918 (40 Stat. 518; 50 U.S.C. 171), the Act of Congress approved August 7, 1953 (Public Law 209—83rd Congress), which act authorized the acquisition of land; and the Act of Congress approved August 7, 1953 (Public Law 207—83rd Congress), which act made funds available for such purposes.

3. The use for which the property is to be taken is for military purposes.

4. The interest in the property to be acquired is all remaining outstanding right, title and interest, if any, of of the Illinois Aircraft Services and Sales Company, Incorporated.

5. The property so to be taken is any possessory rights in the land described in Exhibit "A" hereto attached and made a part hereof, and in the improvements and installations thereon and appurtenances thereto belonging.

On May 2, 1947, the plaintiff, as lessor, and the defendant, as lessee, entered into a written lease for the premises, a copy of which is hereto attached marked Exhibit "A" and made a part hereof.

On February 9, 1948, a written modification of said lease was entered into by the parties, affecting the use and control of the barracks building. A copy of said modification is attached hereto as Exhibit "A-1" and made a part hereof.

On July 3, 1951, the plaintiff received from the defendant its notice of intention to exercise its option to renew the term of said lease pursuant to the provisions of paragraph 1 thereof.

On April 10, 1954, under the powers as prescribed by law, the Commandant of the Ninth Naval Reserve District notified the defendant that under his direction said lease had been assigned to the District Engineer, Chicago District, Corps of Engineers, U. S. Army.

Subsequently, after determination by the plaintiff that immediate possession of said premises is necessary and required for the purposes of defense and the proper integration of the Government's program, on July 27, 1954, a national emergency having been proclaimed, the plaintiff delivered to the defendant a notice revoking said lease effective September 27, 1954, which said notice of revocation is dated June 21, 1954 and signed by Robert T. Stevens, Secretary of the Army, and containing a declaration by the Secretary of the Navy that such revocation was essential, a copy of which notice of revocation is hereto attached and marked Exhibit "A-2" and made a part hereof. Notwithstanding all of which, the defendant still retains possession and refuses to vacate the premises.

6 6. The person having or claiming an interest in the property, whose name is now known, is: Illinois Aircraft Services and Sales Company, Incorporated.

7. The Secretary of the Army of the United States has requested the entry of an order granting the United States the right to immediate possession of property herein described.

Wherefore, the plaintiff demands judgment that the property be condemned and prays the entry of an order granting the United States of America the right to take immediate possession of the property described herein,

and that just compensation, if any, for the taking be ascertained and awarded for such other relief as may be lawful and proper.

/s/ R. Tieken
/s/ R. Tieken
United States Attorney
450 U. S. Court House
Chicago, Illinois
(R) 4—1329

7 EXHIBIT "A"

LEASE OF NAVAL AIRFIELD

This Lease, made between The United States of America, represented by the Chief of the Bureau of Yards and Docks, acting under the direction of the Secretary of the Navy, hereinafter called the Government, and the Illinois Aircraft Services and Sales Company, Incorporated, a corporation duly organized and doing business in accordance with the laws of the State of Illinois, hereinafter called the Lessee;

Witnesseth:

Whereas, the Government is the owner in fee simple of a certain 93.97 acre tract of land, more or less, situated in the County of Cook, State of Illinois, upon which it has developed and operated an airfield and facilities for the activities of the United States Naval Outlying Airfield, Arlington Heights, Illinois; and

Whereas, because of its strategic value, it is considered essential that the said airfield and the facilities thereon, comprising the said United States Naval Outlying Airfield, be retained in a stand-by status for post-war use in connection with Naval Aviation activities; and

Whereas, during such period, the Lessee desires to lease the airfield and the facilities thereon for use as an airport and for such other uses as may be necessary or incidental to this purpose; and,

Whereas, the use of the airfield and facilities by the Lessee for such purposes will in no wise be detrimental to the present activities of the Navy Department, but is on the contrary deemed to be in the best interest of the Government;

Now Therefore, in consideration of the foregoing, and of the covenants and agreements hereinafter mentioned, the Government, represented by the Chief of the Bureau of Yards and Docks, acting under the direction of the
8 Secretary of the Navy, does hereby grant, rent, lease and demise unto the Lessee, to be occupied and used as an airport, and for such other purposes as may be necessary or incidental thereto, that certain tract of land, together with the improvements and installations thereon and appurtenances thereto belonging, enumberated and shown in map of premises and installations of Naval Outlying Airfield, Arlington Heights, Illinois entitled Exhibit "A" attached hereto and made a part hereof, said tract of land being described as follows:

That portion of fractional Sections 4 and 5 and Sections 8 and 9, Township 41 North, Range 11 East, Third Principal Meridian, being more particularly described as follows:

Beginning at a bronze plug marking the northeast corner of fractional Section 5 and the northwest corner of fractional Section 4, aforementioned, said point being in the center line of Central Road; thence west with the north line of fractional Section 5, 1208.73 feet to an iron pipe; thence southerly parallel to the center line of Wilke Road, 2258.64 feet to an iron pipe in the north line of the S½ of the S½ of the NE¼ of Section 8 (passing the south line of fractional Section 5 at 278.64 feet); thence easterly with the north line of the S ½ of the S ½ of the NE ¼ of Section 8, 1208.2 feet to an iron pipe marking

the northeast corner of the SE ¼ of the SE ¼ of the NE ¼ of said Section 8; thence continuing east with the north line of the S ½ of the S ½ of the NW ¼ of Section 9 for a distance of 660.11 feet to an iron pipe marking the northeast corner of the SW ¼ of the SW ¼ of the NW ½ of Section 9; thence northerly with the east line of the W ½ of the W ½ of the NW ¼ of Section 9 and the extension thereof, 2223.86 feet to an iron pipe in the north line of fractional section 4 (passing an iron pipe marking the northeast corner of the NW ¼ of the NW ¼ of the NW ¼ of Section 9 at 1980.58 feet; thence west with the north line of fractional Section 4, 660 feet to the point of beginning. Excepting therefrom that portion of Central Road included within the above described lands and containing after said exception 93.970 acres, more or less.

9 To Have And To Hold the demised premises for the term commencing on the 2nd day of May, 1947, and ending on the 1st day of May, 1952, unless sooner terminated as hereinafter provided and subject to the following conditions and covenants:

1. This lease may be terminated by the Government as hereinafter provided. Further, this lease may be terminated by the Lessee at any time after presentation of a written notice to the Government not less than sixty (60) days prior to its intention to so terminate. It is agreed that the term of this lease may be renewed by the Lessee for an additional period of five years upon the same terms and conditions as set forth herein provided that in the opinion of the Secretary of the Navy the premises are not essential for governmental purposes only.

2. The Lessee, in consideration of the leasing of the aforesaid premises, does hereby covenant and agree

with the Government, that the annual rental for the occupancy and use of the demised premises shall be the sum of Seventy Two Hundred ($7200.00) Dollars, per annum, payable quarterly in advance to the Treasurer of the United States, Navy Department, Bureau of Supplies and Accounts, Central Disbursing Office, Washington 25, D. C. It is provided however, that in the event that the lessee is successful in acquiring leases upon those areas adjacent to the premises herein granted to its use and occupancy which were formerly held under lease by the Government, the said leases being identified as lease Contract No. NOy(R)-34753 and lease Contract No. NOy(R)-34756, then the rental to be paid by the Lessee shall be subject to an equitable renegotiation between the Government and the Lessee upon the basis of a proposition submitted by the Lessee to the Government upon the date of December 4, 1946.

3. The authority to sub-let any portion of the premises covered hereunder is granted to the Lessee for any and all purposes generally desirable in connection with commercial airports and aeronautical operations, provided that it will assume all responsibility for any and all of the acts of its sub-lessees, and further provided that no sublease shall be granted by the Company without the prior approval of the Chief of the Bureau of Yards and Docks, Navy Department, Washington, D. C. The Lessee, however, shall not be required by the terms of this provision to furnish notice in connection with the issuance of routine permits or licenses required relative to its operations upon the premises herein demised to its use so long as such permits and licenses are within the scope and purpose of this lease.

4. The Lessee shall keep and maintain the premises and the facilities and installations herein granted to its

use in good condition and repair so as to properly protect the Government and its property from loss or damage, and upon termination of this lease shall return the premises in the same condition as that existing at the time of entering upon the same under this lease, except for reasonable and ordinary wear and tear, or by circumstances over which the company has no control, provided it has exercised reasonable care to prevent such damage, and further except as hereinafter provided in clause No. 5 hereof.

5. It is agreed between the Lessee and the Government with reference to the building identified as the Barracks upon the map of the premises attached hereto, that the Lessee shall have the right to immediate possession and use thereof, provided however, that the Government reserves the right to repossess and take over this building in the event that it desires to do so for the purpose of reconverting the same into apartments for naval housing purposes, provided however, that in the event of an election on the part of the Government to reenter into possession of this building, it will make every effort to allow the company to retain possession of the first floor in one wing of the building for the Lessee's use, preferably that wing that is most convenient for Lessee's purposes. Should the Government repossess this building, the Lessee will be relieved of its liability for damage and maintenance with respect to the Barracks building only, as provided in paragraph No. 4 hereof, and of its insurance obligation in regard thereto as is hereinafter set forth. If the Government reoccupies all of this building or a part thereof it agrees to make arrangements whereby heat will be furnished to the adjacent hangar and operations building located on the premises, it being understood that the company will pay a reasonable charge therefor.

6. The Lessee shall cause to be placed in force and effect, with such company or companies as are approved by the Government, policies of fire insurance covering the use of the buildings and facilities as herein granted to its use, in an amount to be determined by the Government to cover the Hangar and Operations building and to cover the Barracks building, containing the usual co-insurance clauses insuring the United States of America and the Lessee as their interests may appear, and further, the Lessee shall deposit with the Chief of the Bureau of Yards and Docks, Navy Department, Washington, D. C. satisfactory evidence of such policies of insurance.

12 7. The Government shall not be responsible for damages to property or injury to persons which may arise, incident to the exercise by the Lessee of the rights and privileges herein granted, and in the event that death or injury occurs to any person, or loss, destruction or damage occurs to any property in connection with the use of the premises by the Lessee, its agents, employees, servants, invitees and/or sublessees or by the operation of any aircraft other than aircraft of the United States of America, the company shall indemnify and save harmless the Government from and against any loss, expense, claims or demands to which the Government may be subjected as a result of such death, loss, destruction or damage.

8. The Government at its option and discretion reserves the right to use the landing area in a manner that will not interfere with the operations of the Lessee except that extra use thereof may be made by the Government not to exceed fifty (50%) percent of the landing area capacity by making compensation to the Lessee therefor.

9. The Lessee shall have the right to erect any and all structures and to make alterations and improvements upon the premises to effectuate the purposes of this lease, and

such permanent structures and alterations shall become the property of the Government, at its option, upon the termination of this lease, provided however, that the type of construction and design of such structures, alterations and improvements shall be subject to the approval of the Chief of the Bureau of Yards and Docks, Navy Department, Washington, D. C., in the event such approval is deemed necessary by the Government. The Lessee, shall further, upon termination of its use of the premises, if requested to do so by the Government, remove its structures, alterations and improvements and restore the premises affected by such to the same condition as existed at the time of entering thereon, reasonable and ordinary wear and tear and damage by the elements or by circumstances over which the Lessee has no control excepted.

13.

10. The Lessee, in connection with the operation of the premises and facilities covered by this lease, shall comply with all rules and regulations, except economic regulations, of the Navy Department. Further, the Lessee will maintain and keep the demised premises in a clean, safe and healthful condition according to any applicable, valid Federal or State law. The Lessee further agrees that it will not perform any acts which will impair Federal jurisdiction over the airfield demised hereunder.

11. The Lessee has examined and knows the condition of the demised premises as of the date hereof. It is understood by the Lessee that the said premises are leased as they are and the Lessee acknowledges that no agreement or promise to decorate, alter, repair or improve said premises by the Government has been contemplated. Except as is provided for in paragraph No. 5 above, nothing herein contained shall be deemed to imply any obligation on the part of the Government to furnish the Lessee with any utility services whatsoever, it being

expressly understood and agreed that the Lessee shall obtain such services at the Lessee's sole cost and expense and the Lessee shall pay, in addition to the rent above specified, all water rates and all charges for gas, electric light and power, used by it.

12. The Lessee agrees that it will prevent any use of the premises and facilities herein demised to its possession, including the construction, erection, alteration or growth of any structure or other object thereon, which would be a hazard to the landing, take-off, or maneuvering of aircraft at the airfield, or otherwise limit its usefullness as an airport.

13. The Government reserves the right to enter the said premises at any time during the existence of this lease for the purpose of inspecting the same in order to determine whether the terms hereof are being observed and carried out by the Lessee.

14. It is understood and agreed that this lease will at all times be revocable at will by the Government upon presentation of notice of cancellation to the Lessee, in writing, sixty (60) days prior to such termination, in the event of default with regard to the covenants and conditions of the lease or in event of a national emergency and a decision by the Secretary of the Navy that such revocation is essential.

15. All disputes concerning questions of fact arising under this instrument shall be decided by the Secretary of the Navy or his duly authorized representative, whose decision shall be final and conclusive upon the respective parties.

16. It is agreed between the Government and the Lessee that the Government shall have the right to keep in place upon the premises certain fire fighting supplies and equipment together with other items of personal property and equipment including two Link Trainers, an auto-

motive mobile power crane, an electric lift, wing mounts, pre-heaters and office furniture, and subject to the approval of the local representative of the Navy Department, the Lessee is hereby permitted the use of this equipment in connection with the protection and operation of the demised premises in accordance with such rules and regulations as may be prescribed by this officer and may be removed from the station in the event that in his opinion such is necessary or required. The Lessee will execute an inventory showing this equipment upon entry into possession of the premises. Further, the local representative of the Navy Department is authorized, in his discretion, to furnish certain grading or other construction and/or maintenance equipment for use on the station from time to time in connection with the grading, leveling or drainage of the runways or for the making of such other improvements upon the premises as he may deem to be in the interests of or beneficial to the property of the Government.

17. The Commander, Naval Air Reserve Training, Ninth Naval Disfrict, Glenview, Illinois is hereby designated and empowered to act as the local representative of the Navy Department.

18. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this lease, or to any benefit to arise therefrom. Nothing, however, herein contained shall be construed to extend to any incorporated company, if such agreement be for the general benefit of such corporation or company.

In Witness Whereof, the Navy Department, on behalf of the United States of America has caused this lease to be executed this 2nd day of May, 1947.

The United States Of America
By /s/ Jack E. Cochrane
By direction of the Chief of the

Bureau of Yards and Docks, acting under the direction of the Secretary of the Navy.

16 The Illinois Aircraft Services And Sales Company, Incorporated
By /s/Louis M. Mantynband
Vice-President

Attest:
/s/ Irvin I. Zatz
Asst. Secretary

I, Irwin I. Zatz, certify that I am the Asst. Secretary of the corporation named herein; that Louis M. Mantynband, who signed on behalf of said corporation, was then Vice President, thereof; that the foregoing instrument was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

/s/ Irwin I. Zatz

17 • • •

18 Copy EXHIBIT "A-1"

MODIFICATION OF AGREEMENT NOy(R)-41329
between
ILLINOIS AIRCRAFT SERVICES AND SALES COMPANY, INCORPORATED
and
THE UNITED STATES OF AMERICA

This Modification of agreement entitled Agreement No. NOY(R)-41329 by and between the Illinois Aircraft Services and Sales Company, Incorporated, a corporation duly organized and doing business in accordance with the laws of the State of Illinois, hereinafter called the Lessee and the United States of America, represented by the Chief

of the Bureau of Yards and Docks, acting under the direction of the Secretary of the Navy, hereinafter called the Government:

Witnesseth

Whereas, the Lessee and the Government, upon the date of May 2, 1947, entered into a certain agreement designated as Agreement No. NOy(R)-41329, under which the Lessee was granted a lease covering the U. S. Naval Outlying Airfield, Arlington Heights, Illinois; and

Whereas, under paragraph numbered 5 of the said Agreement No. NOy(R)-41329, the Government retained the right at its election to re-enter possession of the barracks building covered by paragraph numbered 5; and

Whereas, a determination has been reached by the parties hereto that it will be to their mutual benefit for the Lessee to assume full control, possession and responsibility for the barracks building and for the Government to relinquish its right to elect to re-enter the premises for its own purpose other than is generally provided for under the terms of the lease.

19 Now Therefore, in consideration of the premises and of the mutual covenants and agreements hereinafter set forth, it is contracted and agreed by and between the parties hereto as follows:

I

Paragraph entitled and numbered 5 of the Agreement No. NOy(R)-41329, in its present form is modified and amended to the extent that the Government relinquishes its right to re-enter the barracks building as is provided for in this paragraph only and the Lessee agrees to assume full custody and responsibility for the barracks building, in the same manner as the remaining portion of the premises at the U. S. Naval Outlying Airfield were delivered to its custody and control.

II

It is understood by the parties that other than paragraph numbered 5, no other provision of the Agreement No. NOy(R)-41329 is altered, changed or in any wise affected.

In Witness Whereof, the parties have hereunto subscribed their names as of this 9th day of February, 1948.

The United States of America
By /s/ Jack E. Cochrane
By direction of the Chief of the Bureau of Yards and Docks, acting under the direction of the Secretary of the Navy.

Attest:
By /s/ Irvin I. Zutz
Secretary

Illinois Aircraft Services And Sales Company, Incorporated
By /s/ L. M. Mantynband
Vice Pres.

20 • • •

21 EXHIBIT "A-2"
DEPARTMENT OF THE ARMY
NOTICE OF REVOCATION

United States Naval Outlying Airfield,
Arlington Heights, Illinois

To: Illinois Aircraft Services And Sales Company, Incorporated

Whereas the United States of America, as lessor, represented by the Chief of the Bureau of Yards and Docks, acting under direction of the Secretary of the Navy, did enter into a lease agreement on May 2, 1947 with the Illinois Aircraft Services And Sales Company, Incor-

porated, as lessee, covering certain lands and improvements comprising the United States Naval Outlying Airfield, Arlington Heights, Illinois, which lease agreement was subsequently amended or February 9, 1948; and

Whereas said lease, as amended, expired on May 1, 1952, subject, however, to renewal for an additional five (5) year term upon compliance with certain conditions provided therein; and

Whereas the said lessee did elect to renew said lease for an additional five (5) year term; and

Whereas under the laws of the United States, jurisdiction and control over the said United States Naval Outlying Airfield was transferred to the Department of the Army as of April 28, 1954, and the administration of all real property comprising said airfield, including the administration of said lease, was thereby transferred to the Department of the Army; and.

Whereas the President of the United States, by Proclamation No. 2914, dated December 16, 1950, did declare a national emergency to exist, which national emergency is still in effect; and

Whereas possession of the leased premises by the United States of America is required for military purposes; and

Whereas paragraph 14 of said lease provides that the lease may be revoked in the event of a national emergency and a decision by the Secretary of the Navy that such revocation is essential; and

Whereas I, as Secretary of the Army, having succeeded the Secretary of the Navy in administering the said lease on behalf of the United States of America, have decided that the revocation of the said lease is essential

Now, Therefore,

Take Notice That:

Under the authority conferred by the aforesaid transfer

of jurisdiction and the laws of the United States, the lease granted to you on May 2, 1947 of certain land and improvements comprising the United States Naval Outlying Airfield, Arlington Heights, Illinois, for a term of five (5) years beginning May 2, 1947 and ending May 1, 1952, which was subsequently amended and renewed for an additional term of five (5) years, is hereby revoked, effective September 27, 1954. You are hereby notified to remove your property from said premises on or before said date and to restore the premises in accordance with the provisions of paragraphs 4 and 9 of said lease.

The revocation of this lease does not release you from the obligation of paying any rent due to the United States thereunder.

Dated this 21st day of June 1954.

/s/ Robert T. Stevens
Robert T. Stevens
Secretary of the Army

This Notice of Revocation is also executed by the
23 Secretary of the Navy as evidence of a decision by him that revocation of said lease is essential.

Dated this 17th day of July 1954.

/s/ C. S. Thomas

24

IN THE UNITED STATES DISTRICT COURT

(Caption—File No. 54 C 1468)

MOTION FOR ORDER FOR DELIVERY OF POSSESSION
(Filed Oct 6 1954)

Plaintiff moves the Court for an order requiring all defendants to this action and any and all persons in possession or control of the property described in the

Complaint filed herein to surrender possession of the said property, to the extent of the estate to be condemned, to plaintiff immediately and as grounds therefore plaintiff states:

1. The Secretary of the Army of the United States has found and determined that it is necessary and advantageous to the interests of plaintiff to acquire such possession.

2. Plaintiff is entitled to such possession as a matter of right.

/s/ R. Tieken
R. Tieken
United States Attorney

25

IN THE UNITED STATES DISTRICT COURT

(Caption—File No. 54 C 1468)

ORDER FOR DELIVERY OF POSSESSION
(Filed Oct 6 1954)

This action coming on for hearing upon the motion of plaintiff for an order for the surrender of possession of the property described in the Complaint filed herein to plaintiff, and it appearing that plaintiff is entitled to possession of the said property,

It Is Ordered And Adjudged that all defendants to this action and all persons in possession or control of the property described in the Complaint filed herein shall surrender possession of the said property, to the extent of the estate being condemned, to plaintiff immediately.

Provided, however, that the defendant-lessee, Illinois Aircraft Services and Sales Company, Incorporated, and its sublessees, may retain possession and enjoy the use of the Barracks Building and the Hangar and the Trailer Park until December 1, 1954; and provided, however,

that the agents of the plaintiff may enter the Barracks Building and Hangar for the purpose of making engineering studies; and provided, further, that the said defendant shall fly away or otherwise remove all airplanes from the field by sunset, October 18, 1954, in full coordination with the plaintiff's contractors or agents.

Entered at Chicago, Illinois, this 6th day of October, A. D. 1954.

/s/ J. S. Perry
United States District Judge

27

IN THE UNITED STATES DISTRICT COURT
(Caption—File No. 54 C 1468)

ANSWER OF ILLINOIS AIRCRAFT SERVICES AND SALES COMPANY, INCORPORATED, DEFENDANT.

(Filed Oct. 18, 1954)

Now Comes the defendant, Illinois Aircraft Services and Sales Company, Incorporated, and for answer to the complaint says:

1. It admits the allegations contained in paragraph 1 of the complaint and avers that it is entitled to just compensation fo its interest in the land being taken, which interest is hereinafter more fully described.

2. It admits the allegations contained in paragraph 2 of the complaint.

3. It admits the allegations contained in paragraph 3 of the complaint.

4. It avers that it does have an outstanding leasehold interest in the land being condemned, which interest is hereinafter more fully described, denies that public necessity requires the condemnation of all of such interest and avers that public necessity will be adequately served by acquisition by the plaintiff of only such land as lies west of line running north and south desig-

28 nated "Section Line" on the plat attached to the lease marked Exhibit "A" in the complaint herein.

5. It denies that the improvements, installation and appurtenances, namely, the barracks building and trailer park, and the land upon which they are located and utilities and appurtenances, are required for the purpose for which the plaintiff is condemning the land and avers that the unimproved portion of the subject premises as described in paragraph 4 hereof is adequate for such purpose.

It admits that the plaintiff and defendant entered into the written lease attached to the complaint as Exhibit "A" and avers that said lease was drafted by the lessor.

It admits that the parties entered into the modification of the lease attached to the complaint as Exhibit "A-1".

It admits duly exercising its option to renew the term of said lease pursuant to the provisions of paragraph 1 thereof for an additional period commencing May 2, 1952 and ending on May 1, 1957, by reason whereof said lease was effectively renewed to May 1, 1957, upon the same terms and conditions as set forth in said lease.

It admits being notified by the plaintiff that the lease had been assigned to the District Engineer, Chicago District, Corps of Engineers, United States Army.

It has no knowledge or information sufficient to form a belief as to the truth of the averment that the plaintiff determined that immediate possession of said premises is necessary and required for the purpose of defense and the proper integration of the Government's program, as alleged in the complaint, but avers that such determination is wholly irrelevant and does not constitute a basis for revoking said lease. Defendant admits receiving
29 the purported notice of revocation attached to the complaint as Exhibit "A-2". Defendant admits retaining possession and refusing to vacate the demised premises for the reason that the purported notice of revocation is ineffective as hereinafter more fully set forth.

6. The defendant claims a leasehold interest in the subject property, which leasehold expires May 1, 1957 and the terms and conditions of which are those set forth in the lease attached to the complaint as Exhibit "A", and defendant is entitled to just compensation for the taking of all or any part of such interest, including all damages sustained by the defendant by reason of such taking.

7. On July 29, 1954, the defendant sent to the plaintiff its check in the amount of $1,800.00 in payment of the quarterly installment of rent due August 2, 1954 as provided in said lease. On July 30, 1954 the plaintiff lessor, through its duly authorized representative, returned said check to the defendant, assigning as a reason for the return of the check the purported notice of revocation of said lease attached to the complaint herein as Exhibit "A-2", and the plaintiff, lessor, through its duly authorized representative, requested a check for rent covering the period commencing August 1, 1954 and ending September 27, 1954, the latter date being the date upon which the said purported notice of revocation sought to terminate said lease.

8. As will more fully appear from the lease attached to the complaint as Exhibit "A", the lease was revocable at will by the Government in the event of a national emergency and a decision by the Secretary of the Navy that such revocation is essential in order that the demised premises be used in connection with Naval Aviation activities. It was expressly provided and agreed by and between the Government and the defendant in said lease that a revocation of the lease by the lessor, in the case of a national emergency, could be exercised only if the Secretary of the Navy decided that the demised premises were essential for operation as an airfield and facilities for the activities of the United States Navy. In truth and in fact the Government did not

and does not now require the demised premises for use in connection with Naval Aviation activities and the Secretary of the Navy has made no decision that the demised premises are essential for use in connection with Naval Aviation activities, but on the contrary the plan and purpose of the Government is to use the demised premises for army purposes. Such use of the demised premises for army purposes by the Government is not a use specified by the lease as a basis for revocation of the lease by decision of the Secretary of the Navy and the purported notice of revocation is wholly null and void and did not effect a termination of the lease as of September 27, 1954 or any other date. As alleged in the complaint herein, on April 10, 1954, the Commandant of the Ninth Naval Reserve District notified the defendant that under his direction said lease had been assigned to the District Engineer, Chicago District, Corps of Engineers, United States Army and thereafter as of April 28, 1954 jurisdiction and control over the demised premises were transferred to the Department of the Army and the administration of all real property comprising the airfield including the administration of said lease was thereby transferred to the Department of the Army. By reason of the foregoing the Secretary of the Navy thereafter had no legal power to act with regard to the leased premises in any manner whatsoever, including making a determination that the revocation of the said lease
31 was essential and his act in executing the notice of revocation of the lease was of no force nor effect. The alleged determination by the Secretary of the Army that the revocation of the said lease is essential and his execution of the purported revocation of said lease was of no force nor effect. The lease remains in full force and effect until May 1, 1957, subject to sooner termination according to its express terms and provisions.

9. On the 10th day of August, 1954, the defendant herein, filed a complaint for declaratory judgment and injunction against the plaintiff herein, The United States of America, in the United States District Court, For the Northern District of Illinois, Eastern Division, Docket No. 54 C 1154, in which complaint the defendant herein, Illinois Aircraft Services and Sales Company, Incorported, asserted that the purported revocation of lease was null and void and that the lease between the parties remains in full force and effect until May 1, 1957, subject to sooner termination according to its express terms and provisions. Thereafter, the United States of America filed its motion to dismiss the suit filed by Illinois Aircraft Services and Sales Company, Incorporated, in which motion to dismiss the United States of America asserted that the court lacked jurisdiction over the defendants in said suit and further asserted that the lease between the parties had been duly terminated by the lessor by the said notice of revocation sent on July 27, 1954. Thereafter on the 23rd day of August, 1954, Illinois Aircraft Services and Sales Company, Incorporated, voluntarily dismissed its suit without prejudice and prior to any hearing or determination of the issues. The complaint in the instant case to condemn the subject property was filed by the plaintiff with full knowledge of the existing controversy between the parties, the lessor claiming that the lease has been duly terminated as of September 27, 1954 and the lessee claiming that the lease is still in force and will remain in force until May 1, 1957. The United States of America under the foregoing circumstances had as an available remedy a suit in ejectment or similar action testing the right to possession and based upon the theory that the defendant had no further right to possession. By filing the complaint in condemnation in the instant case, the United States of America elected to

pursue a remedy which is inconsistent with the theory that the defendant has no possessory rights and therefore implicitly recognizes the existence of a leasehold interest and is precluded as a matter of law from asserting that the lease has been terminated.

10. On October 6, 1954, upon motion duly made in the above entitled cause by the plaintiff for the surrender of possession of the property described in the complaint, an order was entered requiring all persons in possession or control of said property to surrender possession thereof to the plaintiff immediately with certain qualifying terms and conditions, and thereafter on October 7, 1954 the plaintiff took possession of certain portions of said property by the plaintiff constitutes due process of law only if such possession has been acquired through the exercise of the power of eminent domain and if the plaintiff should hereafter be permitted to question the leasehold interest of the defendant, as above described, after the taking of summary possession without a hearing on the question of the right of the plaintiff to possession as a matter of propriety right, such procedure would constitute a deprivation of the property of the defendant without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

33 11. The subject premises are improved with a hangar, a barracks building and a trailer coach park. Approximately 650 persons are living in the barracks building and in the mobile homes or trailer coaches located in the park, all of which persons are sub-lessees or members of the families of sub-lessees of the defendant. The taking of the entire demised premises by the plaintiff will dispossess and render homeless all of the persons living thereon because of the existing housing shortage in this area. As will appear from the plat attached to the lease

of the demised premises, the hangar, the barracks building and the trailer park area (designated on the plat as "soccer field") constitute a relatively small area in one corner of the demised premises. Defendant avers that the use that plaintiff contemplates making of the demised premises will be adequately met by acquisition of possession of the unimproved portion thereof as described in paragraph 4 hereof and that public necessity does not require condemnation of the area occupied by the barracks building and trailer coach park.

12. Defendant denies that the plaintiff is entitled to immediate possession of said property by virtue of any of the statutes under which the plaintiff is proceeding unless and until a declaration of taking is filed.

/s/ George W. Lennon
George W. Lennon
231 South La Salle Street
/s/ James A. Harrington
James A. Harrington
One North LaSalle Street
/s/ J. Herzl Segal
J. Herzl Segal
One North LaSalle Street
Attorneys For Defendant

35

IN THE UNITED STATES DISTRICT COURT

(Caption—Civil Action File No. 54 C 1468)

MOTION

(Filed Nov 4 1954)

Now Comes the defendant, Illinois Aircraft Services And Sales Company, Incorporated, by George W. Lennon, James A. Harrington and J. Herzl Segal, its attorneys and moves the court:

1. That the order heretofore entered on the 6th day of October, 1954, requiring that the property involved herein be surrendered to the plaintiff, be vacated and set aside for the reason that plaintiff has not filed a declaration of taking nor deposited estimated compensation as required by the Act of Congress approved February 26, 1931, c. 307 (46 Stat. 1421; 40 U.S.C. 258a), and it has not been alleged in the complaint or otherwise shown to the court that the plaintiff needs the property involved herein for any of the purposes enumerated in the Act of Congress approved August 18, 1890 (26 Stat. 316) as amended by the Act of Congress approved July 2, 1917 (40 Stat. 241), and April 11, 1918 (40 Stat. 518; 50 U.S.C. 171), nor is it alleged in the complaint or otherwise shown to the court that war or imminence thereof exists so that immediate possession of said land may be taken without filing a declaration of taking and deposition estimated compensation.

36 2. In the alternative, that said order of possession be modified to extend the time that the defendant-lessee, Illinois Aircraft Services And Sales Company, Incorporated and its sub-lessees may retain possession and enjoy the use of the barracks building and the trailer park and all of the unimproved property lying east of the line running north and south, designated "Section Line" on the plat attached to the lease marked Exhibit "A" in the complaint herein together with all utilities and egress and ingress to said property until the further order of this court.

Illinois Aircraft Services And
Sales Company, Incorporated
/s/ George W. Lennon
George W. Lennon

/s/ James A. Harrington
James A. Harrington
One North LaSalle Street
/s/ J. Herzl Segal
J. Herzl Segal
One North LaSalle Street

37

IN THE UNITED STATES DISTRICT COURT

(Caption—Civil Action File No. 54 C 1468)

State Of Illinois }
County Of Cook } ss.

AFFIDAVIT

Walter Rogers, being first duly sworn on oath deposes and says that he is the Vice-President of the Illinois Aircraft Services And Sales Company, Incorporated, defendant in the above entitled case; that he is in active charge of the barracks building and trailer park now located on the premises which is the subject of these proceedings; that as of Oct. 28, 1954 there are 103 trailers now in the trailer park and there are 335 people living in said trailers; that as of Oct. 28, 1954 there are 31 sub-lessees occupying the barracks building and there is a total of 94 people in said barracks building; that the number of people as of Oct. 28, 1954 residing in the premises is 429; that there is a grammar school maintained in a portion of said barracks building and that there are 55 students attending said school and residing in said trailer park and barracks building; that the adults living in said barracks building and trailer park are employed at various establishments in the vicinity and that there is a critical shortage of housing facilities in that area; that there is a shortage of trailer parks in the Chicago metropolitan area and particularly in

areas in the neighborhood of the present location of the barracks building and trailer park; that if said persons residing upon said premises were forced to move, a real hardship would ensue due to difficulties of finding locations for the trailers that are presently occupying the trailer park, and also because of the necessity of finding housing for the people living in the barracks building and finding locations and housing convenient to places of employment.

Your affiant further states that on Friday, October 29th, 1954, the defendant, Illinois Aircraft Services And Sales Company, Incorporated, served a notice upon each of the sub-lessees presently located in the trailer park and in the barracks building that their tenancy would terminate on November 30th, 1954 and that they must vacate the premises prior to December 1st, 1954; that since receipt of this notice the sub-lessees have experienced great difficulties in finding housing or trailer space and a real hardship exists for them and the members of their families.

Affiant further says that the taking of the entire demised premises by the plaintiff will dispossess and render homeless a large number of the persons living on the premises because of the existing housing shortage in this area; that it appears from the plat attached to the lease of the demised premises which is attached to the lease marked Exhibit "A" in the complaint herein, the barracks building and the trailer park area (designated on the plat as "Soccer Field") constitute a relatively small area in one corner of the demised premises; that on information and belief affiant says that the hangar is adequate to accommodate whatever personnel the plaintiff may desire to house at this location and that the use contemplated by the plaintiff can be adequately met for a considerable

time beyond December 1, 1954 by using that portion of the premises which lies west of the line running north
39 and south, designated, "Section Line" on the plat attached to the lease marked Exhibit "A" in the complaint herein.

On further information and belief affiant says that the plaintiff does not need that portion of the premises occupied by the barracks building and trailer park, the adjacent unimproved land and utilities, for any purposes whatsoever.

Affiant is informed and believes and upon such information states the fact to be that the plaintiff does not contemplate using the installations for training purposes but on the contrary contemplates standby military installations for use only in the event of open hostilities, and the occupation and use of the barracks building, trailer park and the adjacent unimproved land and the utilities connected therewith will not interfere or impede the plaintiff in the construction, operation and maintenance of said military installations.

Affiant further says on information and belief that the present hardship should not be now visited on the occupants of said premises because of the remote possibility of future actual use of the contemplated installations.

Further affiant sayeth not.

/s/ Walter Rogers

Subscribed and sworn to before me
a Notary Public in and for the
County and State aforesaid this
3rd day of November, A.D. 1954.
/s/ Ruth E. Olsen
Notary Public
(Seal)

41

IN THE UNITED STATES DISTRICT COURT

• • (Caption—Civil Action File No. 54 C 1468) • •

MOTION TO STRIKE ANSWER OF DEFENDANT.
(Filed Nov 5 1954)

Now comes the United States of America, by R. Tieken, United States Attorney for the Northern District of Illinois, and respectfully moves the Court to strike the answer filed by Illinois Aircraft Services and Sales Company, Incorporated, defendant, and for finding and judg-judgment that said defendant was not entitled to possession of the property after September 27, 1954, and that no compensation is due said defendant in this cause, citing the following reasons:

(1) The pleadings show that the defendant came into possession of the property involved as lessee under a written lease from the plaintiff, which said lease had been duly revoked pursuant to its covenants and conditions and that the term of said lease expired and that the defendant's rights of tenancy and possession ended by reason thereof as of September 27, 1954.

(2) The said answer sets up no triable issue inasmuch as the question raised therein questioning the necessity for the use of the premises for defense or other Governmental purposes is not subject to judicial inquiry.

42 (3) The other allegation in said answer goes directly to the question of law, whether the lease has been revoked by the notice (Exhibit "A-2") of the Complaint, receipt of which is admitted by the answer, in that it is erroneously alleged that said notice is void.

(4) The said answer does not set up a valid defense.

/s/ R. Tieken
R. Tieken,
United States Attorney

43

• • (Caption—No. 54 C 1468) • •

Friday, November 5, 1954

Present: Honorable J. Sam Perry, District Judge

This day come the parties by their counsel and the defendant by their counsel enter their motion to vacate the order heretofore entered herein on October 6, 1954 and said motion hereby is taken under advisement by the Court and it is

Ordered that the defendants shall file their briefs ten days from this date and the plaintiff shall file its brief five days thereafter and that this cause be and the same hereby is continued to November 26, 1954 at 2:00 P.M. for oral arguments and it is

Further Ordered that possession be stayed until January 1, 1955

45

In The United States District Court

• • (Caption—No. 54 C 1468) • •

Tuesday, January 4, 1955

Present: Honorable J. Sam Perry, District Judge

Upon due consideration the Court being fully advised in the premises it is

Ordered that the Government's motion to strike answer of defendants be and the same hereby is denied

48

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 54 C 1468) * *

MOTION FOR SUMMARY JUDGMENT

(Filed Sep 17 1956)

Now comes R. Tieken, United States Attorney for the Northern District of Illinois, Eastern Division, and under Rule 56 of F.R.P., moves the court to enter summary judgment that the defendant, Illinois Aircraft Services and Sales Company, Incorporated, had no right to possession of the property it occupied when these proceedings were commenced, and that said defendant is entitled to no compensation for the taking of the property involved in these proceedings and the possession thereof.

/s/ R. Tieken
R. Tieken,
United States Attorney for the
Northern District of Illinois

In support of the foregoing motion, the plaintiff, calls attention to the following matters appearing of record in these proceedings which show this to be a purely documentary case. The complaint condemnation alleges that the interest to be acquired in all remaining out-
49 standing right, title and interest, if any of the defendant, and the property taken is any possessory rights of the defendant.

All rights which defendant had in the property were based upon a lease from plaintiff, the term of which had been ended by notice as of September 27, 1954, whereas this proceeding was filed October 1, 1954. The answer denies the legal effect of the notice, but not by reason of any disputed fact or circumstances.

The lease and cancellation notice are of record and the receipt of the notice is admitted. The jurisdiction of the court and the facts that the taking was the exercise of eminent domain for military purposes are admitted.

It is admitted (Paragraphs 8 and 9 of the Answer), that the Commandant of the Ninth Naval Reserve District has assigned control of the airfield property covered by the said lease to the District Engineer, Chicago District, Corps of Engineers, United States Army, prior to the giving of the revocation notice to cancel the lease term; that said notice was signed and served by the Secretary of the Army, and that the Secretary of the Navy also executed the notice to evidence his decision that the revocation of the lease was essential, a requirement contained in the 14th paragraph of the lease providing for its revocation. In the last sentence of Paragraph 5, the answer alleges that the defendant refused to vacate the premises pursuant to the notice of revocation because of reasons thereafter stated, which are that the notice was ineffective by reason of the fact that the Secretary of the Army signed it instead of the Secretary of the Navy.

50 In Paragraph 9, the answer alleges that by filing the complaint in condemnation, the United States elected a remedy which "implicitly recognizes the existence of a leasehold interest and is precluded as a matter of law from asserting that the lease had been terminated."

Paragraphs 4, 5 and 11, contain details that public necessity require taking more than a part of the land taken, thereby setting up issues which are not triable in these proceedings. U. S. v. Meyer, 113 F. 2nd 387, 392 7th Cir. cer. den. 311 U.S. 706. U. S. v. Powelson, 327 U.S. 546, 551. Sears v. City of Ackeron, 246 U.S. 242, 251, U. S. v. Certain Lands in City of Louisville, 78 F. 2nd 684.

52

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 54 C 1468) • •

Monday, November 5, 1956

Present: Honorable J. Sam Perry, District Judge

This day come the parties by their counsel and a pre-trial conference is held and the court being fully advised in the premises it is

Ordered that the Government's motion for summary judgment be and the same hereby is denied and it is

Ordered that this cause be and the same hereby is set for trial on January 2, 1957

1-A

IN THE UNITED STATES DISTRICT COURT

• • •(Caption—Civil Action No. 54 C 1468) • •

(Filed Oct 3 1957)

Transcript of certain proceedings (before the voir dire examination of the jury) had in the above entitled case before Hon. J. Sam Perry, one of the judges of said court, in his courtroom in the United States Court House, Chicago, Illinois, on April 8, 1957.

Present:

Hon. Robert Tieken,
United States Attorney,
By: Mr. Luther D. Swanstrom,
Assistant United States Attorney,
appeared on behalf of plaintiff;

Mr. George W. Lennon,
Mr. James F. Ashenden, Jr., and
Mr. Leonard R. Hartenfeld,
appeared on behalf of defendant Illinois Aircraft Services and Sales Company.

1-B By the Clerk: 54 C 1468, United States of America v. 93.970 Acres of Land, for trial.

The Court: Are both parties ready?

Mr. Ashenden: Yes.

Mr. Swanstrom: Yes.

The Court: Are there any matters to take up before the jury comes?

Mr. Ashenden: Yes, I think there are probably several different points of law that might be discussed.

The Court: All right, we might as well proceed on them and then when the jury comes down we will hold up our discussion.

The Clerk: I have a motion slip calling up a motion for production of documents.

Mr. Ashenden: The point of that was, your Honor, if you will recall, that we were in on a motion for production of those documents. We reached an agreement to do it on an informal basis without an order of court. As a matter of fact, subpoenas were served for those particular documents we were seeking, so for all intents and purposes I think we may either—

The Court: You may withdraw that motion.

Mr. Ashenden: Fine.

1-C Mr. Lennon will address himself, your Honor, to these points of law.

The Court: All right.

Mr. Lennon: Your Honor, my point is very simple. Mr. Swanstrom has served notice to produce certain documents. One of those is the notice to cancel this lease, which was received from the Secretary of the Army and the Secretary of the Navy. It came up previously on the motion to strike our answer. Then it came up again on a motion for summary judgment. In both of those instances the court held that the notice of cancellation of this lease was ineffective because it was not in accordance with the provisions of the lease, and then there was a further point that in questions as to tenancy of defendants here, that it had been waived here by action of the Government in filing a suit for condemnation of the leasehold.

The court has ruled on that point twice, in regard to the invalidity of the notice of cancellation of the lease. So I submit that, that having been ruled upon by the court, —and there is one other point, and that is that the effect of the document would be a question of law for the 1-D court to decide anyway, but my point is that that notice of cancellation cannot be brought to the attention of the jury and cannot go before the jury because it is highly prejudicial and is not a proper matter to be considered by the jury in any event, in accordance with your Honor's two previous rulings where that point was involved.

Mr. Swanstrom: If the court please, I must object to this motion to suppress evidence. I never have understood that the court has ruled as Mr. Lennon says. It is true that the court denied the Government's motion to strike an answer. That is very often done, and then the parties wait until the trial for the development of the entire plot.

The court has also ruled, in my opinion, that the Government was not entitled at that time to a summary

judgment, when the motion was made, which was last December.

The cancellation notice is a bit of evidence, it is a fact. The jury is not to consider the legal effect of it, but rather the operations under that lease, the same as any other fact. It is a fact as much as it is a fact that under the terms of this particular lease the term was extended for another five years. The jury has got to know this
1-E because otherwise there would be no issue at all.

These are facts of operation under the lease, and it is a fact that a document was prepared, served and received. The document was a document drawn under the fourteenth paragraph of the lease, which provides for cancellation of the lease. That is admissible, whatever the effect of it is. Your Honor may want to restrict by instructions—

The Court: Is that one of the issues before the jury?

Mr. Swanstrom: It is part of the development of the case because it is a fact. There are a lot of things here that are facts, but we have a right to produce them before the jury.

As far as estoppel is concerned, there is no estoppel to deny that there is no lease.

As far as the estoppel feature of this thing is concerned, it may be just as well to attack that thing right at this point. In my opinion there could not possibly be an estoppel or, shall we say, an admission by the Government that there was a leasehold in existence merely because this condemnation suit was filed. The Government cannot be bound like an individual is bound.

1-F There are many things about this case, if followed to a conclusion, would make it just utterly impossible for Uncle Sam to operate in a sovereign capacity.

(Mr. Swanstrom then cited and read from cases reported at 154 F.2d 78 and 50 F.S. 470.)

Mr. Swanstrom: I think those two cases demonstrate quite conclusively that there is nothing to the point that because we brought condemnation to get possession—I might say on the side this was the beginning of the Nike program in this most vulnerable area, this most important area, and this is another plant among the Nikes.

It was our own property. The Army had been of course by Uncle Sam designated as the agent to carry out the Nike program, and I would challenge anyone to suggest that the development of our Nike program has not been a great deterrent to our potential enemy.

So there was very good reason, if reason were required, to proceed by way of immediate possession of this property and not by any dilatory process of forcible entry or what have you, where there might be an appeal, and so forth and so on.

1-G I submit there is absolutely nothing to this question of election of remedies, estoppel or what have you, against Uncle Sam. You are not estopped against yourself, and we are the Government.

Mr. Lennon: Of course, your Honor, there is not any question of estoppel. The question is one of the election of remedies which operates as a waiver.

The fact of the matter is that the effect of the written document is a matter of law for the court, and the court has already ruled on its effect in these proceedings under the terms of this lease. The court has ruled twice on it. The matter is a matter strictly for the court and not for the jury, and I resubmit my previous statements, that this is a matter that should not properly go before the jury.

Mr. Swanstrom: But, Mr. Lennon, what are we going to do? Are we going to tell this jury that you have a two and a half year lease without anything at all having happened to it? Are we going to tell them that you have

had a five-year lease with no extension? What are we going to do with this thing?

Mr. Lennon: We are going to do what the lease provides.

Mr. Swanstrom: All right. What are you going to 1-H say about the fact that something was done?

Mr. Lennon: That the Government filed a condemnation suit and came in and took this property.

Mr. Swanstrom: But before that what did the Government do? Are you going to avoid that and commit the worst error that you can possibly commit in this case?

Mr. Hartenfeld: May I say something?

Mr. Swanstrom, in our opinion there is only one issue for the jury, and that is to determine the amount of compensation we are entitled to under the Constitution, for the two years and eight months left on the lease. That is the only issue.

Mr. Swanstrom: That is all I am going to say.

Mr. Hartenfeld: I was just trying to answer your statement. The court has already ruled we have a valid lease. The only issue before the court and the jury is, how much are we entitled to be paid?

This is our position, your Honor.

The Court: Well, it seems to me that the question of the lease, so far as the present hearing is concerned, has been determined there, and I think I determined it in the same manner I did in that other case, and I believe certiorari was denied in that, was it not?

Mr. Lennon: Isn't that the National Tea case?

1-I Mr. Hartenfeld: I believe it was the National Tea case.

The Court: That is my memory of it.

Mr. Swanstrom: The National Tea case never went to the Court of Appeals.

The Court: I thought it did.

Mr. Swanstrom: No, it never did.

The Court: Didn't it go up at all?

Mr. Swanstrom: No.

Mr. Hartenfeld: It certainly is good law.

Mr. Swanstrom: That was the final end of that case. It was settled before your Honor.

The Court: It was finally settled then. I remembered you doing that, but I assumed it was settled because there had been a proceeding above.

Mr. Swanstrom: No, no. It was settled on an entirely different basis, so that element went out of the case.

The Court: So the only thing that was left was my opinion then.

Mr. Swanstrom: Well, your Honor, when I settled the case I did not go on that. I went on a practical proposition.

The Court: What I mean is that so far as the law is concerned there is no higher authority than my own case which I relied upon in this case. That is the correct way of saying it.

1-J

Mr. Swanstrom: That is right, but you never had the question of a jury or the facts of the thing. You did not have the question there, your Honor, as to whether you should admit the dormant estate as a matter of fact before the jury. Then you would have had something maybe like this one.

Mr. Hartenfeld: Mr. Swanstrom, if we do not have a valid lease we would not be in court today. If we have a valid lease then you are not entitled to tell the jury that we have a cancellation notice, because obviously that is going to prejudice the jury. There is not any doubt about it.

Mr. Swanstrom: That does not follow at all. You may spring on this stand, as was done in one of these other

cases, a deed. How do I know that you are not sitting there with an unrecorded deed, or anything else? That does not go at all.

Mr. Hartenfeld: What are you trying to prove by showing it to the jury? You are not going to have them decide an issue of law that has been decided by the court.

Mr. Swanstrom: It is a question of fact.

Mr. Hartenfeld: But you do not introduce im-
1-K material facts that are going to prejudice the jury. This is fundamental law.

Mr. Swanstrom: Do you mean to say we cannot tell them we served this notice?

Mr. Hartenfeld: What is the purpose of telling it to the jury?

The Court: There is not any controversy but what there were two years and eight months of a valid lease left, so far as the court's decision is concerned, is there?

Mr. Swanstrom: What is this, your Honor?

The Court: So far as the court's decision on the matter, on the question that has been before the court, the court has already decided, has it not, that there is a valid lease which had two years and eight months to run, which was terminated, and that the question before us is as to what they are entitled to under that two years and eight months, isn't that all there is before the court, before the jury?

Mr. Swanstrom: I do not think so. But if you rule that way, why,—

The Court: I believe I have already ruled that way, and I suppose the only reason it is brought up now is for the—I say I believe, I know I have so ruled.
1-L The only reason it is brought up now is to object in advance to any introduction of evidence concerning the service of cancellation.

Mr. Hartenfeld: Yes, sir.

Mr. Swanstrom: I expect to offer it during the regular course of the trial, so as to have the record straight.

The Court: Well, you are entitled to offer it.

I would sustain you—I suppose you put it in the form of a motion to exclude that type of witness, and, of course, when counsel comes to making his record he can present it out of the presence of the jury under Rule 43, and we will proceed. I believe I would simply reverse my complete ruling if I allowed a jury now to determine that.

Mr. Swanstrom: I have never had the benefit of your Honor's rationale as to why you held as you now say you held, that there is a valid two and a half year lease to go. I have never had the benefit of it. I have never known whether you have stated that the reason for—

The Court: I thought we had it pretty thoroughly discussed, that matter.

Mr. Swanstrom: I have never known, your Honor, whether you mean that because the Army had juris-
1-M diction of the field—of course, I do not suppose it would make much difference now whether—

The Court: I think we went into that pretty thoroughly and I decided that there had been an election of remedies at the time—

Mr. Swanstrom: Oh, election of remedies.

The Court: —and that the Government had chosen condemnation, and since the Government had chosen condemnation it had to rely on the law and the evidence concerning condemnation of what they are condemning, two years and eight months of lease. That is my understanding.

Well, that—

Mr. Ashenden: That point is behind us then, Judge?

The Court: That point is behind us now.

Mr. Ashenden: All right.

The Court: And counsel will make his record on that. He is entitled to do that.

What is next?

Mr. Ashenden: I think there are some fundamental things that we can stipulate to. For example, the admission of the lease.

Mr. Swanstrom: Yes, of course.

Mr. Ashenden: And the option, or the modification 1-N of the lease. That should probably—

The Court: I think you had better prove that.

Mr. Ashenden: Let us make it clear. What do you want us to prove? Prove the lease?

Mr. Swanstrom: No, no.

The Court: Prove the modification, he said.

Mr. Ashenden: All right. Let us make a note of this, Judge.

There is another practical matter. Mr. Hartenfeld here, who is an attorney and who is co-counsel, is also going to be a witness in this case. As a practical matter, there will be points of law that will probably also be argued before your Honor in connection with other matters of our evidence that we expect to adduce here later on, and in view of the fact that our office came into this case only —we filed our appearance actually last Wednesday—we are prepared on most of the facts, to go ahead and try these matters and bring them on before the jury and the court, but on some of these points of law I am asking the court's indulgence and Mr. Swanstrom's, whether, out of the presence of the jury, Mr. Hartenfeld could speak as an attorney on some of these issues.

1-O Do you have any objection to that, Mr. Swanstrom?

Mr. Swanstrom: None whatever.

The Court: Outside of the presence of the jury, all right.

As far as the jury is concerned, he will be a witness on the merits.

Mr. Swanstrom: I have no objection either way. I do not think that lawyers should make much of a point on things of that kind.

Mr. Ashenden: I do not think there will be much of a problem on it.

The Court: I think counsel is wise is protecting the record as far as any possible future criticism in the higher court is concerned, so it is clearly understood that he is not appearing generally as counsel.

Mr. Ashenden: I believe we can get to other matters connected with the Government's motion or notice to us to produce other documents. There was a list of, I believe, two pages of documents which we were to bring, and they have I suppose the secondary evidence or the copies of these other letters and notices. We believe we know the purpose for this motion, but when we get to that I think there will be ample time to discuss the admissi-

1-P bility of those.

I think that is all we have to talk about now.

The Court: Have you anything further?

Mr. Swanstrom: No.

The Court: All right. Mr. Marshal, call the jury.

(Here followed the voir dire examination of the jury.)

1-Q IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 54 C 1468) * *

I, Edward Newlander, do hereby certify that I reported the proceedings in the above entitled case before Hon. J. Sam Perry, one of the judges of said court, on April

8, 1957; and that the foregoing is a true and accurate transcript of the proceedings had before the voir dire examination of the jury.

/s/ Edward Newlander
Official Court Reporter
United States District Court
Northern District of Illinois

1 IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 54 C 1468) * *

(Filed Oct 3, 1957)

Transcript of proceedings had in the above entitled case before Hon. J. Sam Perry, one of the judges of said court, and a jury, in his courtroom in the United States Court House, Chicago, Illinois, commencing April 8, 1957.

Present:

Hon. Robert Tieken,
United States Attorney,
By: Mr. Luther D. Swanstrom,
Assistant United States Attorney,
appeared on behalf of plaintiff;

Mr. George W. Lennon,
Mr. James F. Ashenden, Jr., and
Mr. Leonard R. Hartenfeld,
appeared on behalf of defendant Illinois Aircraft Services and Sales Company.

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2 (During the voir dire examination of the jury the following proceedings were had:)

Mr. Ashenden: Is there any reason, as you sit there now, that would prevent you from being fair and impartial?

A Juror: No, sir.

Mr. Ashenden: Would you be hesitant at all about voting, if the evidence showed that we were entitled to it, a sizable verdict against the Government?

Mr. Swanstrom: If the court please, I suspect he is going to keep pounding that "sizable verdict" to all of them. I think it is a conditioning process that is not quite proper and I think there should be some caution about it.

The Court: I don't think you need go into that. I think one general question to all of the jurors would cover it.

If the evidence shows that the claimants in this
3 case are entitled to a sizable verdict, according to the evidence, will you grant it; and if it is a comparatively small verdict will you grant that likewise?

Mr. Swanstrom: Or none at all, your Honor? Many jurors have done that.

Mr. Ashenden: I object to that.

The Court: I do not believe that that would stand up in the higher courts.

Mr. Swanstrom: They have done it in this circuit, your Honor.

The Court: If they found no money at all, counsel, I would be compelled to grant a new trial, and we would be wasting their time, and this should not be submitted to the jury except on the basis of finding a fair value, and no value would be one that would be just the kind of a verdict I would have to reverse.

And the same back there, would you answer the question in the same way?

It is my opinion that it is submitted to you for a determination of what the value of this leasehold is, and a fair value, according to the evidence. If the evidence
4 is fair and substantial, that is your verdict. You will find it probably controversial. You will prob-

ably have to determine between the various sets of evidence that you receive and arrive at it. You will be the judges of the facts. Will you do so?

On the other hand, if you find, when you have examined it all, that they have been injured a comparatively small amount and the evidence is that way, will you so find it?

A Juror: Yes.

The Court: And the same way back there.

All right. I think that will cover the matter of valuation.

Mr. Ashenden: Thank you very much, Judge.

(Thereupon the voir dire examination of the jury resumed, following which the jury was duly sworn.)

(Thereupon an adjournment was taken until 10:00 o'clock a.m. of the following day, April 9, 1957.)

5 * * (Caption—No. 54 C 1468) * *

Before Judge Perry
and a jury,

Tuesday, April 9, 1957,
10:00 o'clock a.m.

Trial resumed pursuant to adjournment.

Present:

Same as before.

(Opening statements not transcribed.)

The Court: Call your first witness.

Mr. Swanstrom: If the court please, I understand that the defense has subpoenaed one of the agents of the Great Lakes Naval Station, subpoena duces tecum, and I think

it would only be courtesy to permit them to call him now for whatever purpose they wish.

The Court: Very good.

6 Mr. Ashenden: Thank you very much, Mr. Swanstrom.

The Court: It does not make very much difference in this kind of a case, we can call the evidence out of order. You may do that.

Mr. Ashenden: Would you take the stand, please?

The Court: Mr. Clerk, swear the witness.

WILLARD E. HUMMELAND, called as a witness herein on behalf of the defendants, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Ashenden.

Q. Will you state your name, sir?

A. Willard E. Hummeland.

Q. What is your occupation, sir?

A. I am a director of the real estate division of the District Public Works Office, 9th Naval District.

Q. And what is your rank?

A. I am a civilian.

Q. Oh, you are a civilian.

A. Yes. I was in the Navy before. I am a civilian.

The Court: I recognize that.

By Mr. Ashenden:

7 Q. Mr. Hummeland, you were served a subpoena duces tecum?

A. I was.

Q. Under the processes of this court last week, were you not?

A. That is correct.

Q. In accordance with that subpoena have you pro-

duced in court today a letter dated April 14, 1953, from the Commander of the Naval Air Base, 9th Naval District, to the Chief of the Bureau of Yards and Docks, Serial 2658?

A. I have. This is our file copy of that letter.

Mr. Ashenden: I will ask that this be marked, if the court please, as Defendants' Exhibit 1 for identification.

The Court: It may be so marked.

(Said document was marked Defendants' Exhibit 1 for identification.)

By Mr. Ashenden:

Q. In addition to that, have you brought with you the first, the fifth and sixth endorsements thereon? Do you have that?

A. I have those, file copies of those documents.

Mr. Ashenden: I will ask that these be marked as Defendants' Group Exhibit 2 for identification.

The Court: Do you want to label them 2-A, -B and -C?

Mr. Ashenden: Yes, I do, Judge. I think it would be better to mark them that way.

(Said documents were marked, respectively, Defendants' Exhibits 2-A, 2-B and 2-C for identification.)

By Mr. Ashenden:

Q. Mr. Hummeland, have you brought another letter, dated May 5, 1954—

A. I have.

Q. —from the Chief of the Bureau of Yards and Docks to the Department of Army, Office of Chief Engineers, Washington, D.C., Serial C-422?

A. I have.

Mr. Ashenden: May we mark this as Defendants' Exhibit 3 for identification?

The Court: It may be so marked.

(Said document was marked Defendants' Exhibit 3 for identification.)

By Mr. Ashenden:

Q. Have you brought with you, Mr. Hummeland, exact duplicates of these originals?

A. I have, copies.

Mr. Ashenden: We will ask leave of the court, then, that we withdraw the originals and substitute the duplicate copies in evidence, so that the Navy may have the originals for their files.

The Court: They may be so marked and received as the original exhibits, as far as that is concerned. There is no objection to that.

Mr. Ashenden: All right.

The Court: There is no objection?

Mr. Swanstrom: No objection.

The Court: It is admitted that these are authentic originals, and the authentic copies may be similarly marked and received and the originals may be returned, having been exhibited in open court to counsel for both sides, and the copies will now stand as the exhibits in lieu of the originals. You may mark them now, take the time now to mark them so that there is no question.

Mr. Ashenden: Thank you, Judge.

Q. One question covering all of these documents: Were these all received in the normal course of events and filed as official Naval departmental correspondence?

A. The Exhibit 1 and I guess it is 1-B were prepared in my office.

Q. Yes.

A. That is Commandant Meinvetter's—

Q. Yes.

A. —Commandant, Ninth Naval District, first indorsement.

Q. Yes.

A. That was originated in our office.

Q. And as to the others?

A. The other copies, the fifth and sixth endorsements on the letter to the Department of the Army are
11 carbon copies received in our office.

Q. In the normal course—

A. Yes, in the normal procedure, Navy correspondence procedure.

Mr. Ashenden: Thank you very much, Mr. Hummeland.

The Court: Is there any cross examination?

Mr. Ashenden: Do you have any cross examination?

Mr. Swanstrom: I have no cross examination. Of course, when the offer is made I will have my objection to the introduction of these exhibits.

The Court: He hasn't offered them yet.

Mr. Ashenden: I haven't offered them.

Mr. Swanstrom: As to the materiality of them.

The Court: You might want to ask the witness something about that, so you had better make your offer while the witness is still here.

Mr. Ashenden: I don't think this offer goes to the official phase of it—I mean your objection.

12 Mr. Swanstrom: I might ask him one question.

The Court: Yes.

Cross Examination by Mr. Swanstrom.

Q. All of this correspondence passed, was prepared and passed prior to the execution of the lease of the subject airport to the Illinois Aircraft Services and Sales Company, Incorporated, under date of the 2nd of May, 1947?

A. No; after, of course. This correspondence is dated in 1953 and 1954.

Q. Oh, the correspondence is dated after the—

A. Yes, sir.

The Court: Is that all?

Mr. Swanstrom: But you were going to put in also, I think, an amendment to the lease extending the period five years?

Mr. Ashenden: I don't think that at this time there is any offer to—

Mr. Swanstrom: I think you had better, otherwise we don't have a complete case, that is, we don't start
13 off right. This is a kind of a hodgepodge, anyway, but you assumed the obligation of showing, you told the judge, that this lease had been extended five years, from 1947 to 1952, is that right?

Mr. Ashenden: If the court please, I don't see at this point why there is any reason that we should get into this discussion now, as far as this witness is concerned.

The Court: As far as this witness is concerned, does this particular witness have your leave in custody, are you going to ask for it from him?

Mr. Ashenden: No, your Honor.

The Court: That is all that this witness has that you desire?

Mr. Ashenden: This is all this witness has that we desire.

The Court: Witness excused.

(Witness excused.)

The Court: There is no objection to the authenticity and the genuineness and the foundation? What objections you have go to the materiality, is that correct?

14 Mr. Swanstrom: That is right.

Mr. Ashenden: That is correct.

The Court: So that there can be no question.

All right. We will hear that objection when it is made.

Mr. Swanstrom: Are you through, Mr. Ashenden?

Mr. Ashenden: Yes, I am.

Mr. Swanstrom: I think we decided yesterday that the lease was going to be put in. Have you got the original? Otherwise I have a copy here.

Mr. Ashenden: Maybe we can accept your copy.

The Court: Yes. If it is agreed upon it saves the trouble of withdrawing later.

Mr. Swanstrom: I think it is legible. Is your copy better?

Mr. Ashenden: This is legible.

Mr. Hartenfeld: They are all about the same.

Mr. Swanstrom: I offer in evidence at this time as Plaintiff's Exhibit 1 the lease between the United States of America and the defendant covering this airport, dated May 2, 1947.

I understand there is no objection to it?

Mr. Ashenden: There is no objection.

Mr. Swanstrom: So it may be marked Plaintiff's Exhibit 1.

The Court: Admitted.

(Said document, so offered and received in evidence, was marked Plaintiff's Exhibit 1.)

Mr. Swanstrom: Now, if the court please, this lease is for a period of five years, and it provides that the lessee may exercise a right to extend the period on the same terms and conditions provided that in the opinion of the Secretary of the Navy the premises are not essential for governmental purposes.

You stated that this lease had been extended under that provision?

Mr. Ashenden: If the court please, again I don't see—this is part of the proof we will put on when we have our case. I don't see that there is any point of our getting into that now. There is no dispute about it.

Mr. Swanstrom: The point is this. We decided yesterday, I thought, that they were going to prove the extension. The lease is now going in—

The Court: You put in your lease, then when they come to their time they will put in what they say they are going to.

Mr. Swanstrom: Very good.

The Court: I cannot compel them to put it in until their time for proof has come, then they should put it in.

Mr. Swanstrom: I would like at this time to read certain portions of this lease to the jury.

The Court: Anything that is in evidence you may read, counsel.

Mr. Swanstrom: This is the lease from the United States of America to the defendant, of this land that you saw yesterday.

The lease recites:

"Whereas, the Government is the owner in fee simple of a certain 93.97 acre tract of land, more or less, situated in the County of Cook, State of Illinois, upon which it has developed and operated an airfield and facilities for the activities of the United States Naval Outlying Airfield, Arlington Heights, Illinois; and

"Whereas, because of its strategic value, it is considered essential that the said airfield and the facilities thereon, comprising the said United States Naval Outlying Airfield, be retained in a stand-by status for post-war use in connection with Naval Aviation activities; and

17 "Whereas, during such period, the Lessee desires to lease the airfield and the facilities thereon for use as an airport and for such other uses as may be necessary or incidental to this purpose; and,

"Whereas the use of the airfield and facilities by the Lessee for such purposes will in no wise be detrimental to the present activities of the Navy Department, but is on the contrary deemed to be in the best interest of the Government.

"Now Therefore, in consideration of the foregoing, and of the covenants and agreements hereinafter mentioned, the Government, represented by the Chief of the Bureau of Yards and Docks, acting under the direction of the Secretary of the Navy, does hereby grant, rent, lease and demise unto the Lessee, to be occupied and used as an airport, and for such other purposes as may be necessary or incidental thereto, that certain tract of land, together with the improvements and installations thereon and appurtenances thereto belonging, enumerated and shown in map of premises and installations of Naval
18 Outlying Airfield, Arlington Heights, Illinois entitled Exhibit 'A' attached hereto and made a part hereof, said tract of land being described as follows:—"

There follows a long description of metes and bounds, which we are not interested in—

"To Have And To Hold the demised premises for the term commencing on the 2nd day of May, 1947, and ending on the 1st day of May, 1952, unless sooner terminated as hereinafter provided and subject to the following conditions and covenants:

"1. This lease may be terminated by the Government as hereinafter provided. Further, this lease may be terminated by the Lessee at any time after

presentation of a written notice to the Government not less than sixty (60) days prior to its intention to so terminate. It is agreed that the term of this lease may be renewed by the Lessee for an additional period of five years upon the same terms and conditions as set forth herein provided that in the opinion of the Secretary of the Navy the premises
19 are not essential for government purposes only."

Then follows that the lessee shall pay a rental of $7200 per annum. This is in reference to subletting, which may be done under the consent of the—with the prior approval of the Chief of the Bureau of Yards and Docks.

"The Lessee, however, shall not be required by the terms of this provision to furnish notice in connection with the issuance of routine permits or licenses required relative to its operations upon the premises herein demised to its use so long as such permits and licenses are within the scope and purpose of this lease.

"4. The Lessee shall keep and maintain the premises and the facilities and installations herein granted to its use in good condition and repair so as to properly protect the Government and its property from loss or damage, and upon termination of this lease shall return the premises in the same condition as that existing at the time of entering upon the same under this lease, except for reasonable and ordinary wear and tear, or by circumstances
20 over which the company has no control, provided it has exercised reasonable care to prevent such damage, and further except as hereinafter provided in clause No. 5 hereof.

"5. It is agreed between the Lessee and the Government with reference to the building identified as the Barracks upon the map of the premises at-

tached hereto, that the Lessee shall have the right to immediate possession and use thereof, provided however, * * * that in the event of an election on the part of the Government to reenter into possession of this building, it will make every effort to allow the company to retain possession of the first floor in one wing of the building for the Lessee's use, preferably that wing that is most convenient for Lessee's purposes."

The next is inconsequential.

The next is in reference to carrying insurance.

The next is that the Government shall not be responsible for injuries or damages.

Then:

"8. The Government at its option and discretion reserves the right to use the landing area in a
21 manner that will not interfere with the operations of the Lessee except that extra use thereof may be made by the Government not to exceed fifty (50%) percent of the landing area capacity by making compensation to the Lessee therefor.

9. The Lessee shall have the right to erect any and all structures and to make alterations and improvements upon the premises to effectuate the purposes of this lease, and such permanent structures and alterations shall become the property of the Government, at its option, upon the termination of this lease, provided however, that the type of construction and design of such structures, alterations and improvements shall be subject to the approval of the Chief of the Bureau of Yards and Docks, Navy Department, Washington, D.C., in the event such approval is deemed necessary by the Government. The Lessee shall further, upon termination of its use of the

premises, if requested to do so by the Government, remove its structures, alterations and improvements and restore the premises affected by such to the
22 same condition as existed at the time of entering thereon, reasonable and ordinary wear and tear and damage by the elements or by circumstances over which the Lessee has no control excepted.

"10. The Lessee, in connection with the operation of the premises and facilities covered by this lease, shall comply with all rules and regulations, except economic regulations, of the Navy Department. Further, the Lessee will maintain and keep the demised premises in a clean, safe and healthful condition according to any applicable, valid Federal or State law. The Lessee further agrees that it will not perform any acts which will impair Federal jurisdiction over the airfield demised hereunder."

The next is that the Lessee has made an examination and takes the premises as they are:

"14. It is understood and agreed that this lease will at all times be revocable at will by the Government upon presentation of notice of cancellation to Lessee, in writing, sixty (60) days prior to such termination, in the event of default with regard to the covenants and conditions of the lease or in event of a national emergency and a decision by the
23 Secretary of the Navy that such revocation is essential.

"15. All disputes concerning questions of fact arising under this instrument shall be decided by the Secretary of the Navy or his duly authorized representative, whose decision shall be final and conclusive upon the respective parties."

I think that is all I will read. My voice will not stand up for more.

Mr. Ashenden: If the court please, there was one item, there was an Exhibit A referred to in the body of the lease that Mr. Swanstrom just read, and in his copy here I don't believe that that was attached to it.

Mr. Swanstrom: No. I tore it off, and I should have left it on.

Mr. Ashenden: I have got one here. This was a map of the place.

Mr. Swanstrom: This lease—of course, the reason I tore it off was that it also carries a notice of revocation.

Mr. Ashenden: If the court please, we believe—

Mr. Swanstrom: I can't see how we can—

24 Mr. Ashenden: If the court please, we have this point, and we would like to be heard on this. I believe there was a preliminary discussion on the point of law on this very topic, and we would like to be heard on this at this time.

The Court: It was not affected, so it won't make any difference. The jury is hearing only the issue here.

The Government had two ways of proceeding, either by condemnation or by a proceeding which it did not follow. We are trying the case which it did follow, which is the process of condemnation.

Mr. Swanstrom: I will have to object to that. We have more ways to proceed than just condemnation, or we can proceed by condemnation to effectuate the same thing as we could by the other.

The Court: I said you had different ways to proceed; you chose the condemnation proceeding, and that is the proceeding that is the method we are following.

Mr. Swanstrom: We also know—

The Court: I will instruct the jury that in the opinion of this court, what other remedies the Government might have had are not admissible as evidence as far as this

case is concerned, and the jury shall not be con-
25 cerned with them.

Mr. Swanstrom: That is on the theory that you say the Government is estopped. It is an elective remedy that—

The Court: We discussed all that, and the court has already ruled on it. We have ruled that we only have one issue before us, and that is the value of the leasehold which the Government is condemning or has condemned, and the only thing that is left is for the jury to decide the value of that leasehold.

Mr. Swanstrom: But the jury has got to decide also on what we have taken, and you cannot go into this court without showing what we have taken or what we didn't take.

Mr. Ashenden: If the court please—

The Court: Then the map should be attached that was detached.

Mr. Swanstrom: Yes, and also all notices should be attached.

The Court: Those notices have nothing to do with it. I have already ruled on that.

Mr. Swanstrom: If the lease has expired—

The Court: I have already ruled on that, counsel.

Mr. Swanstrom: If the lease has expired—

26 Mr. Ashenden: If the court please, there are other points that are bound to come up right now, and we might as well dispose of these points of law. If you don't mind, Judge, I think we should hear some of these things at this point.

The Court: I thought we had ruled rather conclusively.

Mr. Swanstrom: The judge has already ruled, counsel, that we can't show the cancellation notice.

Mr. Ashenden: Well, you keep talking about it, Mr. Swanstrom, and I wish that—

The Court: I am afraid we will now have to excuse the jury. We will excuse the jury a moment.

(The following proceedings were had in open court, out of the hearing and presence of the jury:)

The Court: All right.

Mr. Ashenden: Everything that we discussed yesterday, Judge, was relative to the fact that the notice of cancellation not only couldn't be admitted into evidence, but that the purpose of that was that the jury would not even hear about any type of thing like that. Now, he has mentioned it no less than five times in the space of five minutes. He knows why he is talking about
27 it, I know why he is talking about it, and here now the jury specifically knows there had been a notice of cancellation, at least they feel there has been a notice of cancellation served upon the defendants here.

This is exactly what our motion to exclude was designed to prevent.

Mr. Swanstrom: I haven't offered the notice—

Mr. Ashenden: Now it is almost worse now, that they will speculate about this thing.

Mr. Swanstrom: I haven't offered the notice, and that is all the ruling was. The judge can instruct this jury, if he feels like it, that any notice that might have been served is invalid.

The Court: In my opinion, we had already ruled on it.

What are you making a motion for now?

Mr. Ashenden: If the court please, this may be by way of—

The Court: Are you moving to withdraw a juror at this time, or what is your motion?

Mr. Ashenden: No, I am not doing that, Judge.

Here is the reason primarily that we asked to be heard. In addition to this point that we talked about yesterday, and I think very, very closely related to your ruling
28 on the question of the effect of this notice of cancellation, is a ruling that goes hand in hand with that, on the question of whether this lease can be cancelled for any purposes by the Government, or whether it can be cancelled only for the purpose of Naval aviation.

This is a subject that was gone into in detail—

The Court: That was something that I thought we were not going into at all, because the cancellation was not a problem.

Mr. Ashenden: If the court please, this subject will be gone into, because all of the experts that will testify—

Mr. Hartenfeld: Excuse me, your Honor. He was not in at the early stages.

Mr. Ashenden: And I would prefer to have somebody who was at that time state it.

Mr. Hartenfeld: The problem that is worrying Mr. Ashenden is that which the experts testify they have to make some kind of a statement of their consideration of the so-called cancellation lease. If your Honor has already ruled, as apparently you did yesterday, that the cancellation is not in the case at all, and so instructs the appraisers and other expert witnesses, to consider value on the basis of no cancellation, that of course is one
29 thing.

But if Mr. Swanstrom will start asking his witnesses, is this a valueless lease because it can be cancelled at any time for any purpose by the United States, obviously he is going to get a different conclusion from his experts than we will, and the net result will be that the jury will be trying a matter of law instead of a

matter of fact, which Mr. Swanstrom very subtly today—not so subtly, has already put into the record, in the way of putting legal issues before this jury.

If we have to combat some more tactics of this type and nature, there is just no point in the appraisers, they will be completely confused, the attorneys will be confused, and so forth.

As I recall what you just said, your Honor, the question of the cancellation of this lease is completely out of the picture, and we move at this time that Mr. Swanstrom, the Government, be advised not to put in the record any more references to the cancellation, either by way of direct references to the cancellation notice, or by reference to their appraisers or other experts on any assumptions that the lease is subject to cancellation.

Mr. Swanstrom: Do I understand that motion means that we cannot refer to clause 14 of the lease, which provides for cancellation?

Mr. Hartenfeld: That is what his Honor has ruled.

Mr. Swanstrom: That we cannot ask the witnesses about what their opinion is, as they look at a lease, with these terms and conditions? Is that the way you want the court to instruct this jury?

Mr. Hartenfeld: The court has already ruled that cancellation is out of the picture.

Mr. Swanstrom: I have nothing further to say, your Honor.

The Court: Wait a minute. I have ruled that the notification of cancellation was not in this case.

Mr. Hartenfeld: That is right.

The Court: That is all I have ruled, that the notification of cancellation is not in this case.

Mr. Hartenfeld: That is correct.

We are faced, therefore, with the second proposition,

under what circumstances can this lease be cancelled. And on that point, your Honor, Mr. Lennon argued this over a year and a half or two years ago, when the case first arose. He argued it again, as I recall, at the time the Government's motion for summary judgment was overruled.

31 The fundamental point in this case, as I understand the court has ruled, is that this lease can be cancelled only for aviation purposes, Naval aviation purposes, and that is the theory upon which we are proceeding with this case.

At this time it seems to us—

Mr. Swanstrom: I understood the court's theory—

Mr. Hartenfeld: —the court should clarify Mr. Swanstrom's mind on that point.

Mr. Swanstrom: I understood the court's theory, why we are here and have not gone away long since with a judgment, summary judgment, is that because the Government selected this method of getting possession of its property, it is estopped to proceed, to deny that you had some interest, but I didn't think that the court went so far as to say that he was going to emasculate the lease for the purpose of an appraiser evaluating it or for the purpose of a jury evaluating your leasehold if you have one. You have got a 60-day lease, Mr. Counsel—

Mr. Hartenfeld: Let us get this straightened out between ourselves, Mr. Swanstrom.

There are two theories. One is election of remedies, which you definitely have in the picture against the Government—

32 Mr. Swanstrom: You couldn't estop the Government. You know that.

Mr. Hartenfeld: The other theory is that you construe the preamble of the lease together with the body

of the lease, and it is an inescapable conclusion that you can't—

Mr. Swanstrom: We have argued that before the judge.

Mr. Hartenfeld: That is right, we did argue it, and it is our understanding the judge so ruled.

Mr. Swanstrom: And there was no ambiguity about what the judge ruled.

Mr. Hartenfeld: Mr. Lennon argued that point when the matter was up previously.

Mr. Swanstrom: No, the point is not that at all. The point is, are you going to ask this court to instruct the witnesses and the jury that they may not construe the provisions of this lease?

Mr. Hartenfeld: Except to the point of Naval aviation being the only reason for the possible cancellation, that they can do.

The Court: Wait a minute. That would be a matter of proof, would it not?

Mr. Hartenfeld: That is correct, your Honor, and we are willing to fight it out with the Government
33 on the factual question of whether or not the Navy would have revoked this lease.

The Court: It is my opinion that what I have ruled is that the Government has not the right to introduce any question about cancellation—

Mr. Hartenfeld: That is correct, sir.

The Court: —because it selected the other remedy. Now, as to whether it has a right under the terms of the lease, I couldn't prevent their witnesses from testifying on that. I couldn't prevent your witnesses from giving their opinion from the lease that it could only be used for the Navy either.

Mr. Hatenfeld: If the court please, the witnesses might be put in the position of being lawyers or con-

struing a judicial question here, as to the meaning of the cancellation clause.

I understood that your Honor had ruled that the cancellation clause means, when construing the lease as a whole, that it can be cancelled only for Naval aviation purposes, and we submitted briefs two years ago on that question at great length, and that of course is a different thing from having appraisers determine what this cancellation clause means.

34 Mr. Swanstrom: Counsel, you are just confusing the thing. Do you think that there is anything to prevent the Army from transferring this thing to the Navy tomorrow, and the Navy cancelling it?

Mr. Hartenfeld: This is not the question.

Mr. Swanstrom: So what you are talking about now is entirely beside the point.

The judge has simply said now that he is not going to restrict the witnesses or the jury from examining this lease and judging it by all of its favorable and unfavorable provisions to either party.

Mr. Hartenfeld: Mr. Swanstrom, are you trying to say that a witness who is not a lawyer can understand whether this cancellation means, this cancellation clause means that it can be cancelled by the Government for any reason, or on the other hand could be cancelled only for Naval aviation purposes?

Mr. Swanstrom: Are you going to say that a real estate expert is not able to read a lease?

The Court: Gentlemen, you are now talking on the question of what the jury will be instructed. Isn't that what you are talking about?

Mr. Hartenfeld: We are actually talking about—

The Court: I will instruct the jury in accordance with

my previous ruling here, but I don't see how I can
35 prevent either side from putting in their evidence
as to what they determine the value of the premises to be pursuant to their theory of the case.

Mr. Swanstrom: I would hesitate, I would feel very bad if you did that, Judge, because it would be contrary to all the authorities—

The Court: Because what?

Mr. Swanstrom: Contrary to all the authorities, if you didn't do what you say now you are going to do, it is just impossible—

The Court: That is what I thought all the time I was going to do as far as the evidence is concerned.

Mr. Swanstrom: That is right.

The Court: You could put your witnesses on and you can ask on your theory that it can be cancelled for all purposes, and then on cross examination the other side would have a right to go into it—

Mr. Swanstrom: Certainly.

The Court: —to ask, suppose it couldn't be cancelled, what would your answer be? Then as far as that is concerned they have a right to put their witnesses on the stand and go through the same thing in reverse, and when it comes to instructing the jury, I will instruct the jury
in accordance with my previous arrangement, my pre-
36 vious decision. I think that is the only way it can be construed.

I don't believe that I can deprive the Government from asking various hypothetical questions on this.

Mr. Hartenfeld: Actually, your Honor, this may be a very good solution to preserving the record. If the questions can be put to the experts along these lines: What is your opinion as to the value of the leasehold, remaining leasehold, providing it can be cancelled on 60 days

notice for any reason; then: What is your opinion if it could be cancelled or not be cancelled.

The Court: He will ask him on the first basis, and on cross examination you have got a right to ask him on the other basis, and then I will instruct according to my previous finding here, we will have all the evidence. I want to avoid any error in the matter. If my previous ruling is error, I have spent a lot of time on it, and I don't believe it is error, but I believe it would be erroneous for me to restrict the Government in proving what they think the value is, on their theory of the value.

Mr. Ashenden: I think you have struck upon the proper solution to this, Judge. We have been debating in our own minds for quite some time as to how
37 proof was going to be elicited on this expert testimony question, and I think this is the answer.

The Court: They can put in their proof the way they want to, and you can cross examine the way you want to, and then you put in your proof, that is my understanding of it, and then I will instruct them on what I think the law is after we have heard the evidence.

Mr. Hartenfeld: If the court please, there is one other issue that should be decided before the jury is brought out.

The Court: We are not going to bring them out, we are going to take a recess, but go ahead.

Mr. Hartenfeld: And that is this question that Mr. Swanstrom has been assuming to the jury that we did not renew this lease for five years.

Now, in the notice of cancellation—I know why he is doing this. In the notice of cancellation—

The Court: You are going to prove that, you tell me.

Mr. Hartenfeld: Your Honor, here is the point, though. The only way we can conclusively prove that to the

minds of this jury is to have an admission by the Army that it was done, and the only way we can do that
38 is to point to the notice of cancellation of the lease, in which the Army concedes that that was renewed for five years more.

What he is trying to drive us into is the position of offering that notice of cancellation to the jury to prove that our term was extended for five years, and at the same time therefore to bring before the jury the highly prejudicial matter which you have already ruled, your Honor, should not be brought to the attention of the jury.

Therefore, I suggest that a stipulation or some statement by the court to the effect that this lease has been renewed for five years, and that the Government concedes that it has been renewed for five years, should be made in this record, and the jury be so advised.

Otherwise we have the very prejudicial problem of how to prove our renewal to the jury, when the only document we can point to as an admission by the Government is the cancellation notice.

I think this is a terribly important point, particularly when Mr. Swanstrom has gone out of his way to violate your request of yesterday not to mention this cancellation notice to the jury, and this morning, in spite of
39 your cautioning him yesterday, he did it. I think this is one way that we can make amends to get this prejudice out of the minds of the jury.

Mr. Swanstrom: Haven't you got anything to show your renewal?

Mr. Hartenfeld: We have letters that we sent to the Navy stating that we renewed the lease. Legally we did renew the lease. We got letters back from the Navy that because of technicalities they claimed we were a hold-over tenant. You know about that. Finally, after a great

deal of negotiations and arguments with the Navy, they finally conceded that this lease was properly renewed for five years, and it so states in the cancellation notice.

We never got a piece of paper from anybody saying in effect that it was renewed for five years.

Mr. Swanstrom: I had assumed all the time that you had a separate piece of paper that renewed your lease.

Mr. Hartenfeld: No, sir, we don't, and I think I mentioned that to you the other day in the office when we were discussing the problem.

Mr. Swanstrom: I will have no objection to your testifying on it. You are interested in the property. You can testify. I won't make any objection.

Mr. Hartenfeld: I would like a statement from the court to overcome what you have said, to overcome the prejudice in the jury's mind, that this lease has been renewed for five years and the Government so concedes it, and there certainly is no harm in the court making such a statement.

The Court: You can resolve that if you want to by offering the signatures on the extension and that part of the instrument which says that there is an extension, and you offer that portion only—

Mr. Hartenfeld: It will be one sentence out of the cancellation notice.

The Court: And it can be read to the jury, rather than to be taken out into the jury room.

Mr. Hartenfeld: Your Honor, may we read that one sentence out of the cancellation notice, and just identify the document by date?

The Court: You may identify it and mark it, and after your identification as to the instrument, you may then offer that part of the instrument only, if you wish to make such an offer.

Mr. Hartenfeld: In other words, your Honor, we
41 may offer that one sentence in the instrument without the Government introducing the whole document from which it is taken?

The Court: I don't think that is necessary. The Government will object, of course, but—

Mr. Swanstrom: I was just going to say I will object, but you will understand I am not doing it for any facetious purpose.

The Court: Of course, I understand it. On the other hand, you are offering it now only for the purpose of that one thing?

Mr. Hartenfeld: That is right, your Honor.

The Court: I think you are entitled to identify the document and mark it, and after you have identified it, offer that portion of the document which you offer, I think that is all you are required to offer of it, and you may have it read to the jury, rather than the whole document, because otherwise you would have to cover up the whole document as to what it was, and that arouses suspicion of the jury as to what is in it.

Mr. Hartenfeld: That is right, your Honor.

The Court: That would be my suggestion of the way to handle it.

Mr. Hartenfeld: Fine.

42 The Court: Let the Government make its own offer, make its own objection, and we can cover that outside of the jury and dispose of that.

Mr. Swanstrom: I offered counsel this as an exhibit, if they wanted it—

Mr. Hartenfeld: That is different.

Mr. Swanstrom: This proves the modification, doesn't it, or the extension?

Mr. Hartenfeld: Except that this calls us a holdover

tenant, which is obviously very prejudicial to the jury. Let's not go into that.

Mr. Swanstrom: I don't see that that is prejudicial.

The Court: I don't believe that that is prejudicial to you, you are a holdover tenant, where you have got your original agreement in which you are entitled to be held over for five years. What is wrong with that?

Mr. Hartenfeld: The thing is, your Honor—

The Court: You are a holdover tenant under the terms of your lease. I see nothing prejudicial about that.

Mr. Swanstrom: I have offered them the use of that.

Mr. Hartenfeld: Legally it means as you say, your Honor, but to the layman I am afraid the word is not an understandable word.

43

The Court: I don't see how it could be prejudicial with the lease in the record. I don't see how you could be prejudiced. Here is your lease, and it says that you can hold over for another five years, and here is your extension of five years.

I think that is your best solution.

Mr. Hartenfeld: May we use the other solution if we decide to use it, your Honor, after thinking it over?

The Court: You think it over.

We will take a recess for a few minutes.

(A short recess was taken.)

(The following proceedings were had in open court, in the hearing and presence of the jury:)

The Court: You may proceed further.

Mr. Swanstrom: If the court please, I have found a very legible copy of the lease and would rather substitute that for this one.

The Court: All right, it may be substituted.

Miss Reporter, will you mark that?

Mr. Swanstrom: That is Plaintiff's Exhibit 1.

The Court: Mark it Plaintiff's Exhibit 1, in lieu
44 of the other copy.

(Said document was marked Plaintiff's Exhibit 1 for identification.)

Mr. Ashenden: Is it the same as the other one?

Mr. Swanstrom: Here, you can compare them. Both have the maps.

I was going to suggest before the jury came in, that he prove his amendment, and I make my offer.

The Court: Ladies and gentlemen of the jury, counsel wants to take up one more matter with me out of the presence of the jury. He had reminded me of it and I forgot it. I will excuse you for just a minute.

Mr. Swanstrom: Just a moment. If he wants to prove his amendment, then excuse them, then I can make my offer. And he has got the modification also that he wants to put in, about the barracks.

The Court: All right. Then go right ahead with that, and we will excuse the jury later for your purpose.

Mr. Swanstrom: All right, your Honor.

Mr. Ashenden: Will you mark this as Defendants' Exhibit 4 for identification?

45 (Said document was marked Defendants' Exhibit 4 for identification.)

Mr. Ashenden: I would like to offer in evidence modification of agreement between the Illinois Aircraft Services and Sales Company, Incorporated, and United States of America, dated February 9, 1948.

Would you like to see this, Mr. Swanstrom?

The Court: Admitted. What exhibit number is that?

Mr. Ashenden: This is Exhibit 4, Judge.

The Court: All right.

(Said document, so offered and received in evidence, was marked Defendants' Exhibit 4.)

Mr. Ashenden: If the court please, with your indulgence I will read this now to the jury.

The Court: All right.

Mr. Ashenden: Ladies and gentlemen, this is a modification of an agreement betwen Illinois Aircraft Services and Sales Company, Incorporated, and the United States of America:

"THIS MODIFICATION of agreement entitled Agreement No. NOy(R)-41329 by and between the Illinois Aircraft Services and Sales Company, Incorporated, a corporation duly organized and doing business in accordance with the laws of the State of Illinois, hereinafter called the Lessee and the United States of America, represented by the Chief of the Bureau of Yards and Docks, acting under the direction of the Secretary of the Navy, hereinafter called the Government:

46

WITNESSETH

"WHEREAS, the Lessee and the Government, upon the date of May 2, 1947, entered into a certain agreement designated as Agreement No. NOy(R)-41329, under which the Lessee was granted a lease covering the U. S. Naval Outlying Airfield, Arlington Heights, Illinois; and

"WHEREAS, under paragraph numbered 5 of the said Agreement No. NOy(R)-41329, the Government retained the right at its election to re-enter possession of the barracks building covered by paragraph numbered 5; and

"WHEREAS, a determination has been reached by the parties hereto that it will be to their mutual bene-

fit for the Lessee to assume full control, possession
47 and responsibility for the barracks building and for the Government to relinquish its right to elect to re-enter the premises for its own purposes other than is generally provided for under the terms of the lease.

"NOW THEREFORE, in consideration of the premises and of the mutual covenants and agreements hereinafter set forth, it is contracted and agreed by and between the parties hereto as follows:

I.

"Paragraph entitled and numbered 5 of the Agreement No. NOy(R)-41329, in its present form is modified and amended to the extent that the Government relinquishes its right to reenter the barracks building as is provided for in this paragraph only and the Lessee agrees to assume full custody and responsibility for the barracks building, in the same manner as the remaining portion of the premises at the U. S. Naval Outlying Airfield were delivered to its custody and control.

II.

"It is understood by the parties that other than paragraph numbered 5, no other provision of the
48 Agreement No. NOy(R)-41329 is altered, changed or in any wise affected.

"IN WITNESS WHEREOF, the parties have hereunto subscribed their names as of this 9th day of February, 1948.

"(Signed) The United States of America, by Jack E. Cochrane, By direction of the Chief of the Bureau of Yards and Docks, acting under the direction of the Secretary of the Navy.

"Illinois Aircraft Services and Sales Company, Incorporated, By L. M. Mantynband, Vice President."

Mr. Ashenden: If the court please, I have a document here which contains in the body thereof a portion relating to the topic of renewal of the lease. We are asking leave of court to read from this document the portion relating to this subject, for the purpose of proving up that portion of the case.

Mr. Swanstrom: If the court please, I object to that unless the entire document goes before the jury or is read to the jury.

The Court: Objection overruled. Counsel is asking for one portion of it which goes directly to a specific
49 point. There is no dispute as to the genuineness of the document, is there?

Mr. Swanstrom: No.

The Court: You make no dispute as to the genuineness of the document?

Mr. Swanstrom: No.

Mr. Ashenden: We make no offer of the entire document.

The Court: Do you want to state, counsel, for the record, what this document is?

Mr. Ashenden: You mean the title of the document?

The Court: At the bottom, who signs it, and—

Mr. Ashenden: It is a letter from Robert T. Stevens, Secretary of the Army, dated June 21, 1954.

The Court: And concerns the property in question?

Mr. Ashenden: And has direct relation to the property in question, yes.

The Court: There is no question as to the authenticity or the materiality of it; you object because the whole of the instrument is not being read, and you ask to read the other, is that correct?

Mr. Swanstrom: Yes, my objection goes to that, your Honor, that if a portion of this instrument is to be read, it should all be read. This is an instrument from the
50 Secretary of the Army, and—I think that is my objection.

The Court: And you are offering it for one purpose only, and that is for the purpose of showing the extension. I think they are permitted to do that. You may read it if you desire. Objection overruled.

Mr. Ashenden: I am reading, ladies and gentlemen—

The Court: If you at a later time in your case wish to offer the document as a whole, we will pass on that when we come to it.

Mr. Swanstrom: I suspect you ought to identify it, anyway, in some manner.

The Court: Its date and so on, he has—

Mr. Swanstrom: I mean to be identified by the reporter.

Mr. Ashenden: All right, we will identify it.

The Court: Yes, the document ought to be identified and marked as an exhibit, not to be delivered to the jury but part of it to be read.

(Said document was marked Defendants' Exhibit 5 for identification.)

Mr. Ashenden: We are asking now, if the court please, that this document, that a portion of this document be permitted to be read to the jury, and therefore be-
51 come evidence.

The Court: As evidence?

Mr. Ashenden: As evidence.

The Court: And counsel has objected, that the whole should be read. Objection heard, considered, and overruled. You are only offering such part as you believe is pertinent—

Mr. Ashenden: That is right.

The Court: —at this time?

Mr. Ashenden: Yes.

The Court: That is the ruling, and it may be read as evidence.

Mr. Ashenden: And let the record show that the fact that the defendants have marked this as Defendants' Exhibit 5, it relates only to that portion of the document that they are now reading to the jury:

"Under the authority conferred by the aforesaid transferred jurisdiction and the laws of the United States, the lease granted to you on May 2, 1947 of certain land and improvements comprising United States Naval Outlying Airfield, Arlington Heights, Illinois, for a term of five years beginning May 2, 1947 and ending May 1, 1952, which was subsequently
52 amended and renewed for an additional five years.

"Dated June 21, 1954, Robert T. Stevens, Secretary of the Army."

If the court please—

The Court: Go ahead. Counsel wishes to see that.

Mr. Swanstrom: I want to attach that.

The Court: All right.

Mr. Swanstrom: Now, the regular order, I should think, would probably be that I would make my offer, but as I understand that would be outside of the presence of the jury. However, I could interrogate one witness, and then probably, if I make the offer, we would be ready for the noon adjournment.

The Court: All right. Let us take your witness, then, if you wish to.

Mr. Swanstrom: Will you take the stand, please, Mr. Hartenfeld?

I am calling Mr. Hartenfeld under Rule 43(b), as an adverse witness.

53 LEONARD HARTENFELD, called as an adverse witness herein by the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination.

The Court: The Supreme Court gives you that privilege of calling the lawyer, the other lawyer; it gives each side that privilege, if they want to. That is their right.

Mr. Swanstrom: You remember, Judge, they arranged yesterday that he is occupying a dual position as lawyer and witness.

The Court: That is right.

Mr. Swanstrom: He is going to testify, as they announced yesterday, on behalf of the defense, about the matters which—

The Court: And you have therefore a full right to call him as an adverse witness. That is what I want to get across to the jury, that he is called as an adverse witness. Any officer of a company, or a lawyer for the company, if they are called, are called as an adverse witness. That does not make the one who calls him responsible for his testimony, and he may be cross examined. He
54 is called in the nature of cross examination.

All right. You may proceed.

By Mr. Swanstrom:

Q. Will you state your name?

A. Leonard Hartenfeld.

Q. And where do you live, Mr. Hartenfeld?

A. 4970 Marine Drive, Chicago, Illinois.

Q. And your business or profession?

A. I am an attorney at this time.

Q. You have had a financial interest in the defendant company, did you not?

A. Yes, I was a stockholder and vice president as well as attorney.

Q. There was established out there what is called a trailer camp, was there not?

A. Mobile housing is sometimes called a trailer camp, yes, sir.

Q. During the period of the—what is the maximum number of the people that you housed out there?

A. In the mobile housing?

Q. Yes, in the trailer camp.

A. I don't have the exact figures. We have one witness who will testify as to that.

Q. I refresh your recollection from a complaint
55 that was filed by your company—

Mr. Ashenden: I object, if the court please.

The Court: He may show him the instrument and ask him if that refreshes his mind.

By Mr. Swanstrom:

Q. I show you a document which as a lawyer you can tell what it is, and I won't try to embarrass you at all—

Mr. Ashenden: I object to the remarks of counsel and ask that they be stricken.

The Court: Objection sustained and they may be stricken. There is nothing embarrassing about a lawsuit. That is what we have got here.

By Mr. Swanstrom:

Q. If you will read that, then I will ask you a question.

A. Well, yes, I remember that.

Q. How many would you say were housed there in the summer of 1954?

A. Mr. Swanstrom, that paragraph you just showed me refers to the total number of people in both the barracks and the mobile housing. That figure I re-
56 member distinctly.

Q. Can you give us that figure?

A. I cannot break down the figure between the two portions.

Q. Can you give us that figure?

A. Yes. It was roughly around 650 people, maybe more or less by 50. I don't really know.

Q. How many trailers would you say that were parked there, or whatever the expression is, belonging to these people?

A. Mr. Swanstrom, am I supposed to answer this question now?

Q. How many trailers, yes.

The Court: As best you remember.

By the Witness:

A. I don't remember exactly. I would say it was around 100 or a little bit more.

By Mr. Swanstrom:

Q. You said 100 or more?

A. A little bit more, yes, maybe 120. I am not sure.

Q. Was it in excess of 100?

A. I would say so. That is my recollection. You are asking me details of several years ago.

57 Q. I am only taking it from your own figures.

A. The document you showed me, Mr. Swanstrom, was based upon the combined population of the housing and barracks, and—

Q. I am asking you about the trailers, and you say there was in excess of 100?

A. That is right. As far as how many people, I don't know.

Q. We will stop there. You were familiar with the fact that to run a trailer camp required a permit from Cook County?

Mr. Ashenden: Objection, if the court please.

The Court: I don't know what that has to do with it,

but if you can show me that that has anything to do with it you can ask the question.

Mr. Swanstrom: There are certain sanitary conditions that are required, and therefore a license is required from the County—

Mr. Ashenden: I object, if the court please.

Mr. Swanstrom: Subsequently in 1954, and I expect
58 to read the law, a license was applied for to the State to run a trailer camp. I am asking him as a lawyer if he knew that the law required a license.

The Witness: I can answer as a lawyer—

The Court: Just a minute.

The Witness: I am sorry, your Honor.

The Court: I don't see what this has got to do with it.

Mr. Ashenden: I object to that, if the court please. I don't see how this goes to the topic that is material to this case.

Mr. Swanstrom: I will connect it up on rebuttal.

Mr. Ashenden: A lot of bad evidence, if the court please, goes in on that same excuse.

The Court: Let us know what it is going to be.

Mr. Swanstrom: I offer the tourist camp regulations of Cook County.

The Court: I can't for my life see—

Mr. Ashenden: I object to this, your Honor.

59 The Court: —what this has to do with it, counsel, myself. I will excuse the jury a minute. I am trying to find out what is the purpose of this.

Mr. Swanstrom: Do you want to reserve this?

The Court: We will excuse the jury a moment, and find out.

(The following proceedings were had in open court, out of the hearing and presence of the jury:)

The Court: What does this have to do with the case? How are you going to connect it up?

Mr. Swanstrom: Here is the idea, Judge. The lease provides that the lessee is obligated to run this establishment according to the laws, Federal and State, and according to sanitary conditions, I believe.

Now, then, I am going to show, or hope to show, that the sanitary conditions here were such that they couldn't under any circumstances get a license to run a trailer camp. I expect to offer in evidence a certificate under
60 seal, under the rules, showing that they never had a State license.

And I didn't intend to go into this in the case in chief. I simply wanted merely to show how many they had there, they had no license. The rest will simply be in rebuttal, because I don't know what they are going to show.

My position is this, that they had no right to run a trailer camp there without a license.

The Court: The way I look at it, you might have a right to bring in some rebuttal testimony on that question, but what right you have got until they make a showing that they are losing money because they couldn't operate it as a trailer camp, I can't see how you could introduce that. If they come into court and say "This was set up as a trailer camp and we lost money because it was taken away from us, and we were qualified to operate a trailer camp", then you would be entitled to put on rebuttal showing that they had not lost what they said
61 they had lost.

That is my viewpoint on it.

Mr. Swanstrom: The point is, of course, under this kind of examination I am entitled to ask him any kind of question on cross examination.

The Court: Oh, no. It must be still admissible according to the rules of evidence.

Mr. Swanstrom: I can ask him anything, leading questions or anything that would tend to—

The Court: Yes, so long as it is admissible.

Mr. Swanstrom: Let me make it clear—

The Court: You couldn't ask him about his vacation in Wisconsin, could you, in this case, just because he has gone there?

Mr. Swanstrom: I will offer this subsequently, in fact, I intended to offer this on my rebuttal entirely, because I didn't want to confuse the situation, but then on consideration I thought it would only be fair to show who the parties are out there; just generally what they are doing.

62 That is what I have done in trying other cases.

But I am perfectly willing to wait and offer this at the rebuttal.

Mr. Ashenden: Does he withdraw it?

The Court: There is no ground for offering it and asking questions on it at the present time. If they come in here and open up the door, then you will certainly be entitled to offer it on rebuttal.

In this type of case I am more and more convinced that our procedure in this District is not the best procedure, I should have put the plaintiff in the very beginning, so I will not restrict you on rebuttal, I will treat this not as rebuttal in the true sense, but as defense.

The Witness: If the court please, may I just make one comment? As a witness I could not make it at the time, but Mr. Swanstrom has obviously gone way beyond the ordinary procedures in getting things before the jury here which are not in evidence. When I was on the stand just now, this happened very, very strongly. I think

63 it is time he be rebuked to the jury on this point.

The Court: Counsel, I can't restrict him too much. I

can only point out the danger of a new trial in the case of adverse decisions, or something like that—

The Witness: Yes, sir.

The Court: —if too much extraneous matter is gone into. That is all I can warn him on.

Mr. Ashenden: I would like to make this point clear, if the court please. We are interested in expediting this trial as much as anyone, and we are very loath to make any motion along those lines, and we feel that the court in your sound discretion can instruct the jury and admonish counsel on both sides where it is needed. This has a very salutary effect with the jury, and it can eliminate the necessity of going through a new trial.

Mr. Swanstrom: I think your statement is entirely gratuitous. This lease provides how you are to operate it. I have got a right to show how you operated it.

64 The Court: I am not going to restrict counsel for the Government in these matters. As far I am concerned, I am going to let him try the case as he wants to. He is a good lawyer and he is an able lawyer, and if he goes too far and wins his case and has to try it over, I cannot help it. However, I am not going to restrict him. He knows what he is doing.

The Witness: We agree heartily that he is a very able lawyer, and he knows better than to do what he is doing. That is our point.

Mr. Swanstrom: I am through with this witness, and I thought now when the jury is out I would make my offer.

The Court: All right. Make your offer.

The witness is now withdrawn from the stand.

(Witness excused.)

Mr. Swanstrom: I offer in evidence at this time the complete notice of revocation, portions of which were just recently read by counsel for the defendant, being

addressed to the defendant, dated the 21st day of June,
1954 and signed by Robert T. Stevens, Secretary of the
65 Army, and with the endorsement that this notice of
revocation is also executed by the Secretary of the Navy, as evidence of a decision by him that revocation of said lease is essential. The notice further provides that the national emergency is existing, and that of course has not been denied.

I offer this as part of my case in chief.

Mr. Ashenden: I will object, if the court please.

The Court: Will you state your objections into the record?

Mr. Ashenden: The notice of revocation, if the court please, is a document that has already been ruled upon actually on our preliminary motion to exclude. When we were noticed to produce several documents by the Government, this was the first document, and prior to the selection of the jury here the court has previously ruled that the notice of revocation was not admissible and would not be admitted when subsequently offered at the trial.

We are just asking the court to enter the ruling that was previously suggested.

Mr. Swanstrom: I want to include in my offer also,
I would produce Mr. John Malone of the Corps of
66 Engineers, who would testify that he personally served
the defendants' representative with this notice on the 27th day of July, 1954, and I would also call the attention of the court to the fact that in the answer filed by the defendant in this case the receipt of said notice, as stated in the complaint and set out as an exhibit to the complaint, is admitted.

The Court: I take it you gentlemen do not dispute the facts of that but still object to the instrument?

Mr. Hartenfeld: Your Honor, we do not dispute the

physical delivery of the document that he called a revocation notice or some such name. We received that.

The Court: A copy of which is here?

Mr. Hartenfeld: A copy of which is here.

The Court: All right.

Mr. Swanstrom: Before you rule on that it ought to be identified.

The Court: Yes, have it marked.

Mr. Swanstrom: Will you mark this for identification Plaintiff's Exhibit 2?

(Said document was marked Plaintiff's Exhibit 2 for identification.)

67 The Court: It becomes now Plaintiff's Exhibit 2. It was previously marked as—

Mr. Swanstrom: No, only a portion of it.

Mr. Ashenden: That was stipulated in our identification, Judge.

The Court: All right. Then this document, which also includes that portion which you have already read to the jury, is Plaintiff's Exhibit 2.

Mr. Ashenden: That is right.

The Court: That is now made in the form of an offer of proof. The court has previously ruled that the question of revocation is not before the jury. The jury is not called here to determine a lease under cancellation terms and considerations. The court presumes that the Government knew what it was doing, it had some advantage to gain by filing a proceeding under condemnation rather than following the other procedure, which raised a very highly technical point in controversy which the Government sought to avoid, and properly, in my judgment.

The court having previously ruled on this matter, the offer of proof is denied, the objection is sustained, and it

stands under Rule 43 as an offer of proof by the Government as a part of its case in chief.

68 Mr. Swanstrom: And the reasons that I advanced yesterday are in the record as to why this should be admitted, namely, that it is to be admitted as a fact.

The Court: And you now adopt—

Mr. Swanstrom: Yes.

The Court: —the reasons heretofore stated, all of which the court has considered and does again consider, and it does not modify its ruling, but does allow it to stand under Rule 43 and does sustain the objections and refuse it as an exhibit at this time.

Let us call the jury out and we will excuse them until two o'clock.

(The following proceedings were had in open court, in the hearing and presence of the jury:)

The Court: Ladies and gentlemen of the jury, I think we are now at the point where we are going to recess until two o'clock. We will take our recess until two o'clock.

(Whereupon a recess was taken until 2 o'clock p.m. the same day, Tuesday, April 9, 1957.)

69 * * (Caption—No. 54 C 1468) * *

Before Judge Perry and a jury, Tuesday, April 9, 1957, 2 o'clock p.m.

Trial resumed pursuant to recess.

Present: Same as before.

The Clerk: 54 C 1468, United States of America v. 93.970 Acres of Land, on trial.

The Court: You may proceed.

Mr. Swanstrom: Mr. McCahill.

EDMOND C. McCAHILL, called as a witness herein on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Swanstrom.

70 Q. Will you state your name, please?

A. Edmond C. McCahill.

Q. What is your business or profession?

A. I am an attorney for the U. S. Corps of Enginers.

Q. In that capacity do you have occasion to go over properties taken or to be taken from time to time?

A. Yes, that is my occupation.

Q. Did you in the summer of 1954 have occasion to go on the property that is in question here?

A. I did.

Q. The Arlington Airfield?

A. I did.

Q. Did you at that time cause any pictures to be taken?

A. Yes, we have had pictures taken then and prior to then.

Q. I show you two pictures here and ask you if those pictures are some that you had caused to be taken?

A. They are.

Mr. Swanstrom: I ask that these be marked Plaintiff's Exhibits 3 and 4 for identification.

71 The Court: They may be so marked.

(Said documents were marked, respectively, Plaintiff's Exhibits 3 and 4 for identification.)

Mr. Swanstrom: Again I must apologize for my voice, but I can't help it. It has been this way for some time.

Q. Directing your attention to Plaintiff's Exhibit 3 for identification, I ask you to state what that is supposed to represent.

A. That represents the buildings and the mobile units that were on the property in question on or about the summer of 1954.

Q. Is that a true and correct representation—

Mr. Ashenden: Excuse me, your Honor.

By Mr. Swanstrom:

Q. —at that time?

Mr. Ashenden: I didn't hear the last portion of the answer, during what period.

The Court: During what period or date?

The Witness: During the summer of 1954. I believe this picture was taken approximately on May 24.

72 The Court: 1954?

The Witness: 1954.

By Mr. Swanstrom:

Q. Is it a true representation of the conditions as they then existed?

A. It is.

Q. I show you Plaintiff's Exhibit 4 for identification—

The Court: Counsel, while you are on that, might you not inquire whether there were changes made, if you are going to establish that this is a picture as of October 6? You might clear that up before we leave that one.

Mr. Swanstrom: Thank you.

Q. Can you state whether or not that is the appearance of the location in the first week of October, 1954?

A. It is with this exception—

The Court: That is October 6, 1954.

By Mr. Swanstrom:

Q. All right.

A. It is with this exception. It will be noted in these pictures that there are certain aircraft on the field

73 at that time. Of course, they didn't stay there for that period, interim period. There is also a certain

number of trailers, the mobile units were going in and out each day, but that is approximately how the trailer camp looked at that time.

Mr. Ashenden: I object to that, if the court please, now. The question was how it looked on October 6, 1954.

The Court: He says that is approximately how it looked except for the movable—

The Witness: Units.

The Court: —vehicles that were in and out.

By Mr. Swanstrom:

Q. Then the second picture, is that a true representation of the conditions as they existed?

A. That is.

The Court: The same day?

The Witness: The same day.

The Court: That is Plaintiff's Exhibit 4?

The Witness: That is right.

Mr. Ashenden: We have no objection to these.

74 Mr. Swanstrom: These are offered then, your Honor, as Plaintiff's Exhibits 3 and 4.

The Court: Admitted.

(Said documents, so offered and received in evidence, were marked, respectively, Plaintiff's Exhibits 3 and 4.)

By Mr. Swanstrom:

Q. Mr. McCahill, how long have you been with the Government in the capacity that you are now?

A. As an acquisition attorney, since 1945.

Q. There was a unification act whereby the Secretary of Defense was created. Can you state about when Congress passed that law?

Mr. Ashenden: That is objected to, if the court please.

The Court: He may ask him when Congress passed it.

By the Witness:

A. Approximately in October of 1949.

By Mr. Swanstrom:

Q. Prior to that time, Mr. McCahill—the various units, such as Army, Navy, Air Force, and so forth,
75 were placed under the jurisdiction of the Secretary of Defense, is that right?

A. That is correct.

Mr. Ashenden: I object to the leading form of the question, your Honor.

Mr. Swanstrom: Of course it is leading, but—

The Court: Objection overruled. He may answer.

Mr. Swanstrom: I am trying to save some time here.

Q. Prior to that time, the Secretary of the Army and the Secretary of the Navy, did they or did they not operate more or less independently?

A. Well, let me—

Mr. Ashenden: I object to that, your Honor. I think—

The Court: We are getting into a question of law, are we not?

Mr. Ashenden: That is right.

Mr. Swanstrom: It is probably, but the law is what creates facts. However, if you wish, I will withdraw that question.

The Court: Isn't that a matter I should instruct
76 the jury on if we have facts concerning it, as to what the law is on it? I think so. Objection sustained.

Mr. Swanstrom: I would like at this time for the record, and it won't hurt the jury, to read one section of Title 10 of the United States Code. It is Section 1274.

Mr. Ashenden: I will object to that, if the court please.—

The Court: He may read it. I think that is all right.

Mr. Swanstrom: It is entitled "Interchange of Supplies—"

The Court: I think it is much better than to ask the witness, because the law is what it is.

Mr. Swanstrom: "—between the Army and the Navy."

The Court: You may read it.

Mr. Swanstrom: (Reading):

"The interchange, without compensation therefor, of military stores, supplies and equipment of every character, including real estate owned by the Govern-
77 ment, is hereby authorized between the Army and the Navy upon the request of the head of one service and with the approval of the head of the other."

The law passed July 11, 1919, and not repealed until—well, it is 1949, I think.

Then I would like to read—

Mr. Ashenden: If the court please, if it was repealed I don't see why it should have been read to the jury.

Mr. Swanstrom: It covers a period when the lease was executed, and it therefore becomes a part of the lease.

The Court: He establishes the law as it was when the lease was executed and when the lease was renewed, I take it.

Mr. Swanstrom: When the lease was renewed, I now want to read just a short paragraph after the Secretary of Defense—I desire to read a short section entitled Section 483, sub-paragraph (d) of Title 40, United States Code Annotated.

Mr. Ashenden: For the record we would like to
78 put our objection again, if the court please. We feel that this is a matter for instruction to the jury at the time of the instructions, and it should not be done in this fashion.

The Court: I agree with you if there is controversy on what it is, but there is no harm in having the statute read to them, so it may be read.

Mr. Swanstrom: (Reading):

"Under existing provisions of law and procedures defined by the Secretary of Defense, and without regard to the requirements of this section except sub-section (f)—"

and sub-section (f) has to do with nothing except the Director of the Budget.

"—of this section, excess property of one of the departments of the Department of Defense may be transferred to another department thereof."

The first was repealed October 31, 1951, which was after the Secretary of Defense was created, and of
79 course subsequent to the execution of the lease; and then the other, the last one, takes on for the extension of the lease.

I suspect that it is admitted, because it has never been denied, that there was a state of emergency existing, declared by the President. So it is admitted that during this proceeding there was a state of emergency declared by the President of the United States.

That is all.

The Court: Any cross examination?

Mr. Ashenden: Excuse me a minute, your Honor. There will be no questions. Thank you, Mr. McCahill.

The Court: Witness excused.

(Witness excused.)

The Court: Call your next witness.

Mr. Swanstrom: Of course, I may call Mr. McCahill on rebuttal.

The Court: That is all right.

Mr. Swanstrom: I won't call him in—

The Court: You will not be restricted on that if
80 it covers other matters.

Mr. Swanstrom: I have two appraisers in the

courtroom, and I am just looking at which one looks the better. I think you are sitting first, Jack. Will you come up?

The Court: There has not been any motion about excluding witnesses?

Mr. Ashenden: There was no motion.

The Court: I take it nobody desires that.

All right, swear the witness.

JACK WITKOWSKY, called as a witness herein on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Swanstrom.

Q. What is your name?

A. Jack Witkowsky.

Q. Where do you live?

A. I live at 1100 North Dearborn Street, in Chicago.

Q. Where is your office?

A. My office is at 53 W. Jackson Boulevard, in Chicago.

81 Q. That is the Monadnock Block?

A. Directly across the street, yes, sir.

Q. What is your business or profession?

A. I am a realtor specializing in the appraising of real property.

Q. You are appearing here for the Government as a real estate appraiser expert?

A. That is right, sir.

Q. Will you state your qualifications to the court and the jury, and your experience in the appraising profession?

A. Well, I started in the real estate business back in —I am afraid I have got the same trouble you have, counsel, with my voice.

Q. Don't catch it; it is bad.

A. —back in 1933, when I worked in a local real estate office known as F. H. Halvorsen Company on the southwest side of Chicago, on 63rd and Kedzie. Later on I joined a firm known as Harold H. Egan & Company, they were downtown brokers and specialized in business property. Here I was renting agent of such buildings as Union Terminal Building, which was over at Market Street and Adams; the Ryerson Building, which was at Adams and Wabash.

82 In 1937 I joined the Bills Realty Company, who specialized in residential property, as a salesman and in their renting department.

In 1939 I joined the Chicago Real Estate Board as assistant to the chairman of the appraisal committee of the Chicago Real Estate Board.

In 1940 I opened an office specializing in the appraising of real property, and I have operated that office continuously since that time, with the exception of approximately five years when I was in the armed forces.

My office makes appraisals for insurance companies, for financing, such companies as State Mutual Life Insurance Company of Worcester, Massachusetts; Mutual Trust Life Life Insurance Company of Illinois; for Bankers Life Company of Des Moines, Iowa.

We make appraisals for banks in Chicago, such as American National, Northern Trust.

We also make appraisals for governmental bodies such as the Chicago Land Clearance Commission, Chicago Housing Authority.

We have represented a number of law firms in Chicago for estate and inheritance tax purposes, namely,

83 Austin, Burgess & Smith; Mayer, Kabaker, Altheimer & Lipson, and others of a like type.

We have also represented individual holders of real estate, some large, some small, people like the estate of Leander J. McCormick, the University of Chicago, who have large holdings of real estate.

Q. Are you a member of any professional organizations, Mr. Witkowsky?

A. Yes. I am a member of the American Institute of Real Estate Appraisers. I am a member of the Society of Residential Appraisers. I am a member of the Chicago Real Estate Board. I am also a member of the National Association of Real Estate Boards, and Chicago Bankers Association.

Q. Do you serve as an officer in any of these organizations?

A. Yes. I am currently president of the Chicago Chapter of the Society of Residential Appraisers. I have served as an officer or as a member of the board of directors numerous times in the Illinois Chapter of the American Institute of Real Estate Appraisers. I have served as a member of the board of governors of the appraisal division of the Chicago Real Estate Board. I
84 have also served as chairman of the appraisal committee of the Chicago Real Estate Board.

Q. Mr. Witkowsky, we have before us here today what is sometimes called the right of possession of a leasehold. Will you explain what a leasehold is, the rights of possession?

Mr. Ashenden: If the court please, if counsel has finished his qualification examination, there are a few questions I would like to touch on.

Mr. Swanstrom: No objection at all. You can go right ahead now, if you want to.

Mr. Ashenden: May I go ahead now?

Mr. Swanstrom: Certainly.

The Court: You may, limited to the question of qualification.

Mr. Ashenden: That is all, yes.

The Court: All right. You may do so.

Cross Examination by Mr. Ashenden.

Q. Mr. Witkowsky, as I understand it from listening to your resume here of your background, your activity has been quite extensive in real estate appraisals
85 directly, in residential type work, and also, as you say, for these banks and insurance companies in appraising real estate primarily, is that correct?

A. That is correct.

Q. What about any kind of a background in anything to do with the operation of businesses, such as the operation of airports? Have you had any direct or concrete background in those lines?

A. In the operation of an airport?

Q. The operation and management of an airport.

A. No, sir.

Q. Do you have any experience in the accounting field relating to the operation of any type of aviation activities?

A. No, sir.

Q. Well, have you appraised any property that was subsequently used for airports in connection with your background in real estate appraisal work?

A. Yes, sir, many. We did, I think, six airports on the upper part of Michigan in 1942, and that was set up as the defense for the Soo, the Soo Canal up there.
86 We did the extension to Selfridge Field, which approximately doubled the size of that airport. As a matter of fact, in addition to doing these things in the United States, when I was with the Army as an officer, I

set up and sat on the site board and set up two of the airfields in Iceland.

Q. These activities were in connection with procurement by the Army or by some other branch of the Government of property of this type prior to the time of installation, or to secure additional property for the purposes that were in an installation, is that correct?

A. They were part of the site, of the entire site plan, that is right, sir.

Q. In connection with your activities, have you had anything to do with the acquisition of property for private airports?

A. For private airports?

Q. That is right.

A. No, sir.

Q. In other words, it was only Government activities, either local or federal, state, local or federal, that you carried on your activities for in a real estate appraiser's vein in connection with airport facilities, is that right?

87

A. That is correct.

Q. Have you had an occasion in any of these appraisal activities to look into the question of the operation as such that is conducted on the premises?

A. No, sir.

Mr. Ashenden: If the court please, I would like to make at this time an objection, for the reason that a very important part of this case, as will be elucidated later, will be the fair market value of this property, of this leasehold, as it is affected by the management and operation of the business that was conducted on this leasehold. In view of what the witness here has stated, I believe that he does lack the qualifications that are necessary to make a determination that would be reasonable and that

would apprise the jury of a reasonable fair market value which would take into consideration this element of market value.

For that reason, I am going to object to his testifying on this case.

88 The Court: Objection overruled. The jury has heard his qualifications and has heard your cross examination of him. I think they will be able to evaluate his testimony.

Proceed.

Direct Examination (resumed) by Mr. Swanstrom.

Q. Have you had any experience with evaluating leaseholds?

A. Yes, sir.

Q. State just very briefly what?

A. Well, for example, the property that is at the corner of Wabash Avenue and Randolph Street is on a leasehold, and we have appraised that leasehold estate. We have appraised a number of leasehold estates within office buildings. By comparison with property held in fee simple, there aren't too many leaseholds. We have probably done about a dozen or fifteen in our office.

Q. Will you tell the jury what a leasehold is?

A. I think perhaps I could explain it simply by talking in terms of our everyday living, which might be an apartment which we might rent. For example, supposing

89 we had made a fortuitous lease and rented an apartment in a building, say, for $50 a month, and let us say that that lease had a year to run, and that the general going rate for that apartment was not $50 a month but the general going rate for that apartment was $100. Obviously, if we had a lease we would have what we might call a leasehold estate, in other words, somebody would

pay us for that leasehold, because they could rent that apartment for $50 a month, whereby if they would go out and rent another apartment in the building they would have to pay $100 a month. They wouldn't pay us twelve times $50, which would be $600, but they would pay us something for that.

Now, by the same token, if you had this same lease, if you were paying $50 a month but the landlord had the right to cancel that lease at the end of thirty days, then you probably wouldn't have a leasehold estate, because somebody would say, "Well, if I moved in there, if I paid you something for that maybe the landlord will cancel it at the end of thirty days."

I think that is as simple a way as I can explain a 90 leasehold.

Q. Are you familiar with the area we are discussing here, the Arlington Airport?

A. Yes, sir.

The Court: In other words, what you are saying there is, a leasehold is something that somebody might pay you something for and something they might not. You might have an unfortuitous leasehold, you might pay $75 and the going rent was $50, and you couldn't very well dispose of it, and it would be—

The Witness: A burden.

The Court: —an obligation rather than an asset. That is what you are trying to explain between the two?

The Witness: Between the two, that is right, sir.

The Court: A leasehold may be an obligation or it may be an asset?

The Witness: That is right.

By Mr. Swanstrom:

Q. How long have you been familiar with it?

A. Oh, I have probably been familiar with this area for fifteen, sixteen years.

91 Q. Yes, but let us get down to particulars. I think on behalf of the Government I engaged you as an appraiser sometime in—when was it, 1955?

A. 1955, I believe, Mr. Swanstrom.

Q. You had not made any extensive study of the property before that time?

A. Of this specific property, no, sir. I thought you asked about the general area.

Q. Maybe my question was confusing.

A. I am sorry. The specific property, I have known the area generally, because we have done a lot of work within the township, but the specific property, we made an extensive study of the area in September, early in September, or, late in September and early October in—pardon me, in July and August of 1955.

Q. Now, then, will you please describe it to the jury as it was at that time, as near as you can?

A. This was a—may I refer to my notes?

Mr. Ashenden: At what time are we referring to, Mr. Swanstrom?

Mr. Swanstrom: He has identified, he has said, I think it was September or July, 1955, he made an intensive study of it.

92 Mr. Ashenden: All right.

By Mr. Swanstrom:

Q. Proceed, please.

A. This was in what we call an outlying airport, it was about 93 acres, it was a sod field, no paving on it, that is, runway paving. It faced on Central Road, which was a highway, a concrete highway which had an asphalt surface. It ran about 1850 feet on Central Road and went back about 2230 feet on the east side and about 2270 feet

on the west side, and as I say, contained just under 94 acres.

This was known as an emergency airport. It had a barracks building on it, H-shaped frame structure, had asphalt siding, flat roof, approximately fifteen years old. It was originally built for housing Naval enlisted personnel.

It was heated with a two-pipe steam plant, there was a Kewaunee and a Heggie-Simplex boiler, both stoker fired. One of these boilers, I believe, heated the hangar, which I will talk about in a few minutes.

The building had about 13,418 square feet of space in it, exclusive of the basement area, and that was
93 equally divided between the first and second floors.

It had been divided up in plasterboard partitions, had maple floors, and was equipped with approximately 24 kitchen sinks. At the time of my inspection some of these sinks were being moved out, and I couldn't get a really accurate count. They had a cheap grade electric lighting. It was divided by these plasterboard partitions into approximately 46 rooms. Some of these, as I say, were provided with the previously mentioned kitchen sinks. None of these rooms had private baths but the building was equipped with three shower rooms and three toilet rooms, public or quasi-public toilet rooms and shower rooms on the first floor, and two on the second floor, and the combined equipment, there were twelve wall hung lavatories there, there were five shower heads, there were eleven low flush toilets, and three metal stall showers.

Now, to the west of this building there was a one-and-two story asphalt clad frame hangar, and this building was approximately 100 by 164. The north 78 feet was
94 the one story section and had a wood trussed roof and was designed for the storage and repair of small

aircraft, and it had a big overhead door to enter through. The south 22 feet was two stories in height and provided space for offices, living quarters and toilet facilities. There was a partial third floor, I believe at the east end of that building, which had a glass enclosed control tower, octagonal in shape. These toilet rooms that I mentioned consisted of seven low flush toilets, two metal stall showers and four wall hung urinals.

At the time of our inspection there was approximately 500 lineal feet of 15-foot macadam paving which formed a trailer park, with sewer and water connections for approximately 110 to 120 trailers.

The field had its own water supply, there was a well, air compressor and chlorinator; and that was in a concrete pit sheltered by a wood frame building, and that was a 2000 gallon capacity water storage tanks, Johnson type motor with a 7½ horse power motor.

The sewage disposal, which was at the west end of the field, not the west, toward the west end, the west central end, a steel septic tank which discharged into a concrete dosing tank, there were some alternating siphons from which the flows were distributed over the filter beds, there were five concrete pads. There were underdrains which went to a collector bed. The effluent from the collector drain emptied into a drainage ditch which flows north across Central Road.

That basically was the description of the airport.

There was in addition to that a small toilet and shower room which had been constructed for the use of the trailer camp.

Q. Now, did you appraise the value of the rights of the tenant under this lease, which is Plaintiff's Exhibit 1, at that time?

A. Yes, sir, as of—

Q. As of October 6, 1954?

A. Yes, sir, I did.

Q. You have seen a copy of the lease, which is Plaintiff's Exhibit 1?

A. Yes, sir. I believe I have a copy here.

Q. You have a copy.

96 What elements did you take into consideration in arriving at your conclusion as to value?

A. Well, I took in—the first thing I did, of course, was to make an inspection of this airport and its facilities. I then took into consideration the legal documents which went into making up this so-called leasehold estate. The first thing—

Mr. Ashenden: I object, if the court please, to the reference to "so-called". This is a paraphrase by the appraiser, and I don't think it should be in.

The Court: The witness may call it what he likes, and your witness may call it what he likes.

By Mr. Swanstrom:

Q. You mean the lease, don't you?

A. I will call it the leasehold estate, yes, sir. I don't think it makes any difference.

The Court: That is the reason I ruled that way, because it doesn't make an difference what you folks call it, it is what it is and what the court instructs the jury it is, that counts.

By the Witness:

97 A. I took the highlights of this lease, those pertinent parts of that lease, the parts that I thought might be those things that would influence a typical purchaser who might be interested in purchasing.

By Mr. Swanstrom:

Q. Just a minute. You appraisers and the courts are looking for an imaginary purchaser who is ready and willing to buy, and an imaginary seller who is ready and

willing to sell, but neither of whom are under compulsion to do either, is that right?

A. That would be our definition of fair cash market value.

The Court: That would be your ideal?

The Witness: Yes, sir.

By Mr. Swanstrom:

Q. So when you study this lease you have that fictional character in mind?

A. That is right.

Q. The fellow down there in the market place?

A. That is the same person that wants to rent one of these luxurious apartments.

The Court: And if it has a phrase against sub-
98 letting, or something like that, you take all things like that into consideration?

The Witness: Yes, sir, except that I think in this hypothetical case the fact that—we have not taken it into consideration.

The Court: In this case there is no prohibition against subletting, is there?

Mr. Swanstrom: Your Honor—

The Witness: There is a requirement—

Mr. Swanstrom: —they may with the approval of the Department, but I am not insisting that there is any provision against assignment of the lease, that that nullifies the value of the lease.

The Court: Well, if that is not a point we don't have to discuss it.

The Witness: I would like to explain a little bit what I consider to be, as I say, the pertinent facts of this lease. It is a long lease, and I don't want to read it all, but—

Mr. Ashenden: Excuse me, Mr. Witkowsky. To this

I will object, of course. I don't believe now he
99 should be entitled to go through and give his opinion as to all of these various—the language all through the lease.

The Court: Not his opinion as to what they mean, but how it would affect the sale, I think he is entitled to tell how he thinks it would affect the sale, or value, rather.

The Witness: No. 1, this lease was dated on the 2nd of May, 1947, it ran briefly for five years, it covered the 94 acres and the buildings that we talked about, indicated that the rental of $7200 a year provided for a five-year renewal option by the lessee, which renewal option was subsequently exercised, as I found out, and for practical purposes then in this appraisal the lease may have been assumed to have expired as of May 1, 1957, or April 30, 1957.

By Mr. Swanstrom:

Q. By its terms, you mean?

A. By its terms. I will get to the other part of it in a little bit.

100 Actually, when the lease was originally made the Government had the right to come in to reuse the barracks building for its own purpose. That was later waived by modification. My investigation indicated that the Government gave up this right. So that the lessee had the right to use that.

The Court: Then you didn't take that into consideration any more?

The Witness: That the Government had the right to come in?

The Court: Yes.

The Witness: No, sir, I did not.

The Court: Since it was waived—

The Witness: That is right.

The Court: —you didn't take that into consideration?

The Witness: That is right.

The lease provided that the property was to be—this is "Use and Occupancy"—was to be used, to be occupied, and I am quoting now:

"—to be occupied and used as an airport and for
101 such other purposes as may be necessary and incidental thereto".

"Right to sublease for any and all purposes was held by the lessee provided such purposes were generally desirable in connection with commercial airports, but prior approval was required by the Chief of the Bureau of Yards and Docks. The lessee agreed to return the property to the Government in the same condition as that existing at the time of entering upon the property, ordinary wear and tear excepted."

These are incidentals but I think rather important:

"The lessee was required to maintain fire insurance on the property. The Government retained the right to use the landing area in a manner which would not interfere with the operation of the lessee."

Then:

"The lease further provided that upon the termination of the lease the lessee shall, if requested to do
102 so by the Government, remove its structures, alterations and improvements and restore the premises affected by such to the same condition as existed at the time of entering thereon, reasonable wear and tear excepted."

I think probably the most pertinent part of this lease has to do with the concellation clause on both sides. The lease provided that the lessee, that is, the people who are occupying the airport:

"The lease provided that the lessee could terminate the lease at any time on presentation of written notice to the Government of a 60 day notice of its intention to so do. The lease provided the Government with the option to revoke said lease at will upon notice of cancellation to the lessee in writing 60 days prior to said termination in the event of default with regard to the convenants and conditions of the lease, or in event of a national emergency and the decision of the Secretary of the Navy that such revocation was
103 necessary."

Those were, I think, the highlights of the lease.

Our study of the legality, and so forth, of this lease, and how this leasehold was established, we established a chronology of the lease being made in 1947. We found out that in 1954 the transfer, the control of these facilities was made within the Government by the Department of Navy to the Corps of Engineers. The Corps of Engineers—

By Mr. Swanstrom:

Q. To the Army, you mean?

A. Pardon me?

Q. The Army, under the Corps of Engineers?

A. Under the Corps of Engineers, yes, sir, Navy to Army by the Corps of Engineers.

We found out that there was a national emergency existing early in 1954, and that the Nike program of the Government was going ahead, and that the Corps of Engineers had issued to the people involved, the lessee, a notice of revocation of the—

Mr. Ashenden: I object, if the court please.

104 The Court: Objection sustained.

Mr. Ashenden: I ask that that be stricken from the record and the jury instructed to disregard it.

The Court: It is stricken, the jury is instructed to disregard it.

By the Witness:

A. Well, we knew that there was a Nike program going on.

This, then, with the legal basis of this leasehold, with the fact that we were in a national emergency, the fact of the buildings, and my basis of some twenty to twenty-five years of experience in the real estate business, this is what I did in forming, in an effort to come to a conclusion as to the value of this leasehold.

By Mr. Swanstrom:

Q. Sometimes there are comparable transactions that you might take into consideration. There were none, were there?

A. No, sir, there were no comparable situations.

Q. These are the elements?

A. Yes, sir.

105 Q. The document under which the occupancy was held?

A. That is right.

The Court: I think we will take a short recess before we go into that other phase of it.

Mr. Swanstrom: Very good.

The Court: A short recess.

(A short recess was taken.)

The Court: Proceed further with your examination of this witness on direct.

By Mr. Swanstrom:

Q. Mr. Witkowsky, have you stated the important elements of factors which you took into consideration in evaluating this, now?

A. I think I have gotten most of them in, the airport, the lease, the use to which the lease provided that the lessee could use the property, the uses to which the prop-

erty were being put; the location, and my experience of some twenty-odd years in the real estate and the appraising business, yes, sir.

Q. Did you take into consideration—

A. I might add, and the highest and best use that
106 this leasehold could be put to under the terms of the lease.

Q. That was what? I was going to ask you that just now. What was the highest and best use?

A. Under the terms of the lease, it was an airport.

Q. Did you take into consideration the possibility of any restriction in the use as it was being put to, as having any effect upon a potential purchaser?

A. Yes, sir.

Mr. Ashenden: I object, if the court please.

Mr. Swanstrom: Why, it has been held time and again that an appraiser is entitled to take into consideration the possibility of a lawsuit.

Mr. Ashenden: But there is no evidence, no foundation that there was any type of restriction for him to base a conclusion on, Judge. There is nothing in the record. He has stated—

The Court: Read the question again.

(The last question and the answer were read by the reporter.)

107 The Court: I think I will let him answer. I think we are getting far afield, but I will let him answer. You may cross examine him on that question.

By Mr. Swanstrom:

Q. Will you state, then, what is your opinion of the fair cash value of the rights of the defendant in this property as of October 6, 1954?

Mr. Ashenden: I object.

The Court: October 6, 1954, that is the date, isn't it?

Mr. Ashenden: Yes, but I still object, your Honor, for two reasons.

In the first place, there hasn't been any type of a hypothesis that I have heard showing that this witness was aware of the conditions as of October 6, 1954. According to my knowledge of the testimony he has stated that he examined it specifically for the first time either in September of 1955, and then I think he also stated in July or August of 1955. There has been no other fact given to him in any type of a hypothetical question.
108 And outside of his own experience, which is later in time than the operation of this thing, in October of 1954, he has no facts upon which he can base an opinion as to the fair market value of this leasehold as of that date.

The second reason is that he has included in his opinion an item that has been stricken from the record in this case, an item that the Government's attorney has been admonished should not appear in the record of this case and should not be considered in any way. He has stated that his opinion is based in part upon that item.

Now, even though it has been stricken from the record, it cannot be stricken from his opinion, because he stated that that is exactly what his opinion is based upon in part.

So for the reasons that I have stated, we are objecting to him giving his opinion at this time, and we are renewing our objection also on the basis that he is not qualified as an expert in the operation and management of airports, and to that effect his testimony does not
109 bear the weight it should.

The Court: I think the objections largely summarized go to the weight and value of his testimony as an expert, rather than to the admissibility.

He may give his own opinion of it. He may answer.

By Mr. Swanstrom:

Q. What is that—

The Court: You may cross examine on that question also, the element as to whether or not he did take this other element into consideration. You have a right to cross examine on it.

Mr. Swanstrom: I think you had better read my question, otherwise it will be duplicated.

(The pending question was read by the reporter, as follows:

"Q. Will you state, then, what is your opinion of the fair cash value of the rights of the defendant in
110 this property as of October 6, 1954?")

The Court: That was the question. Objection made and overruled. He may answer.

By the Witness:

A. It had no value.

Mr. Swanstrom: Cross examine.

Cross Examination (Resumed) by Mr. Ashenden.

Q. Mr. Witkowsky, you stated that in part one of the elements that your opinion is based upon is the use of the property by the lessee, the highest and best possible use. Is that right, sir?

A. Would you repeat that question?

Mr. Ashenden: Would you repeat that, Miss Reporter, please?

By the Witness:

A. Under the terms of the lease, is the way I believe I stated it.

Mr. Swanstrom: That is right.

By Mr. Ashenden:

Q. I am sorry if I didn't include all of it, that under the terms of the lease it was the highest and best possible use by the lessee?

111 A. That is correct.

Mr. Swanstrom: Excuse me, counsel. Are you trying to put in the words of this witness' mouth that the use which it was being put to was the highest and best use?

Mr. Ashenden: I haven't even proceeded beyond one question here, Mr. Swanstrom.

Mr. Swanstrom: I think the witness has misunderstood your question.

Mr. Ashenden: I will rephrase the question.

Q. Did you not state that one of the elements that you took into consideration in arriving at value was the highest and best use possible under the terms of the lease by the lessee?

A. Under the terms of the lease, that is correct, sir.

Q. Had you ever had any personal knowledge of the operation of the airport at this facility by the lessees?

A. Only insofar as I sat down and spent—oh, I don't know, a couple of hours one afternoon at my office with a couple of the officers of the company, but specifically, no.

Q. And did that visit for a couple of hours have

112 any effect or enter into the opinion that you have stated here today? Did the information concerning, in other words, the operation of the airport, enter into your—

A. Specifically by this company, no, it did not.

Q. Did the operation of the trailer park facility by this lessee enter into the valuation you placed upon it?

A. I think I can anticipate your question, by this company, none of the operation of this facility by this specifis company had anything to do with my opinion.

Q. I believe you have also stated that this—

The Court: Then you took it as if it had no right to operate?

The Witness: No, I took it that—I gave consideration to a typical operator rather than a specific operator, your Honor.

The Court: All right, so the jury understands, a typical operator, not this particular operator.

The Witness: That is right. In other words, this was a business where somebody might do very well, some-
113 body might do very poorly.

By Mr. Ashenden:

Q. In other words, then, you were thinking about, in general, typical operators of airports, is that right?

A. That is correct, yes, sir.

Q. What is your experience on operators of airports and how airports are managed?

A. Well, basically if this lease had not the—

Mr. Ashenden: If the court please, I am asking that he be directed to answer my question.

The Court: Yes, just answer the question as best you can.

The Witness: Will you repeat it, please?

Mr. Ashenden: Would you repeat it, Miss Reporter?

(The last question was read by the reporter.)

By the Witness:

A. None.

By Mr. Ashenden:

Q. And then when you say that you took into consideration the typical airport operation, you don't
114 know of any typical airport operation in your experience, do you?

A. Not under the terms of this kind of a lease, no, sir. It doesn't make any difference under the terms of this kind of a lease.

The Court: May I ask this? No matter what the operation would have been, is it your opinion what the value would have been to anybody operating it, if you had known what the operation was you would still have found it to be of no value under the lease as it now is? Is that your testimony?

The Witness: That no matter what I thought—

The Court: No matter what the value might be to some other individual, to this individual for an operating
118 purpose, when you ran across this cancellation provision, no matter what the value, you would have treated it as of no value because of that clause? Is that what you mean to testify?

The Witness: For an airport of this size and for the apparent potential profits of something of this size, that is right, sir, because they were obligated with this cancellation clause to clean up this field and to return it to the Government in the same condition as they found it, which would have been an obligation of the lessee, in addition to any potential profits that he might have had for a 60-day period.

The Court: What I am trying to get at is, is it your testimony that when you came across this cancellation clause, you said, "That finishes it, it is not worth anything to anybody"?

The Witness: For this size airport, yes, sir, for this operation.

The Court: Well, you say a 90 acre field, roughly 93 acres or something. Would your answer have been
119 different if it had been 500 acres?

The Witness: With a greater potential profit and with the small rent, yes, sir, I think it may have been different.

The Court: It may have been different?

The Witness: Yes.

Mr. Swanstrom: It could depend on the rent, too, wouldn't it, your Honor?

The Court: With that cancellation clause would you not have found it, in the same way, of no value?

The Witness: Except that if there was a large potential profit for the 60-day period during which the potential cancellation may or may not have been made, this may have sold for something.

The Court: But as I understand it you didn't find out whether there was any potential profit or not, did you?

The Witness: Well, it was my opinion that—

The Court: As I understood it you stopped, that is the thing, and I think the jury are entitled to know. That
120 was my understanding of your testimony, that when you ran across that you just stopped. You said everything else was redundant, as I understood your testimony.

The Witness: Basically, on what I had done before, which was as I say an afternoon's conference with Mr. Hartenfeld and one of the other officers from this company, and then when we came to this 60-day clause, yes, sir, I felt that was it, that nobody would pay anything for it.

Mr. Swanstrom: The court will recall, and the jury, that the witness also stated that he took into consideration the fact that the premises had to be restored and put in the same condition.

The Court: That is all I wish to ask. Go ahead.

By Mr. Ashenden:

Q. Mr. Witkowsky, would your opinion be the same if you knew that the operators of this airport extended during 1948, 1949, approximately $50,000 in permanent improvements for this leasehold?

121 A. That would make no difference to me.

Q. And the fact that they, that is, the company,

The Witness: Yes, I considered the possibilities great of cancellation because of the situation, of the personal knowledge of the Nike situation.

By Mr. Ashenden:

Q. I show you now Defendants' Exhibit 1 for identification, and ask you to examine that.

Now I show you Defendants' Exhibit 2-A for identification, and ask you to examine that.

Here is Defendants' Exhibit 2-B for identification. Would you look at that, Mr. Witkowsky?

Now that you have examined these documents, would you say that the likelihood of the Navy acquiring or
125 wanting to acquire this property for Naval aviation purposes after April of 1953 was remote or not?

A. For a Naval operation—

Mr. Swanstrom: Objection. It is not proper cross examination. The documents are not in evidence, it was not touched upon on the direct examination.

Mr. Ashenden: We have again this—

The Court: Objection overruled. He may go into any phase of how he arrived at this conclusion, because he has now told us that he had knowledge that the Nike site was imminent, and since he has testified that, that opens it up. Let us know what knowledge he had, what he was relying on. This is cross examination, and I have to be liberal on allowing that. The jury is entitled to know everything the witness knows.

By Mr. Ashenden:

Q. Do you understand the question?

A. I think so. From these letters it would appear that the Navy no longer wanted the airfield.

Q. So if I ask you again to assume that the only
126 purpose for which this lease could be cancelled would be in the event the Government wanted to take it for

Naval aviation purposes, what would be your opinion as to the effect of this cancellation—

Mr. Swanstrom: This is assuming something not in the evidence.

Mr. Ashenden: May I finish the question?

The Court: Let him finish the question.

Mr. Ashenden: Now I am off. Where was I? Would you start me off again?

(The last question was read by the reporter.)

By Mr. Ashenden:

Q. (continuing) on your valuation of this leasehold?

Mr. Swanstrom: If the court please, I must interpose an objection for the reason the lease is in evidence and the lease does not say a thing about that it is to be cancelled for the purpose of a Navy operation, and therefore this is entirely extraneous—

Mr. Ashenden: This is where we have disagreement.

127 Mr. Swanstrom: —and just the wildest kind of hypothesis.

The Court: I don't know. I haven't seen those documents he is referring to—

Mr. Swanstrom: I am talking about—

The Court: The only document I am aware of is the lease.

Mr. Swanstrom: I am talking about the only thing that is in evidence, and that is the lease, and the lease does not say that the cancellation is only for Naval operation. It doesn't say a word about it.

The Court: I am sure that is correct, but he has handed certain documents to the witness that have been marked and asked him concerning those, and—

Mr. Swanstrom: If the court please, he is not asking on these instruments now. He is asking on the possibility,

the chance that the Government would take this property over only for Naval operations, and that is not in the record.

The Court: That is this man's testimony, the valuation he has placed has been on the theory that the United
128 States Navy or Army or safety department, Department of Security, would not take the premises, and he says he knows something of it. He is being cross examined, and he is shown these documents, and he is entitled to an answer. He may answer it.

Mr. Swanstrom: If the court please, I hate to do this, but he said these documents indicate the Navy didn't care for the airport at that time. He didn't say anything about the Department of Defense or the Army or the Government.

The Court: That is one of the issues, whether the Navy wanted it, and the Navy is the one that signed the lease originally, as I understand it.

Mr. Swanstrom: I understand, your Honor, you have ruled out this as an issue by refusing my offer.

Mr. Ashenden: I object to that. May we have—

The Court: I can't refuse the man on cross examination, where the witness says he attaches no value
129 and that he knows of the imminence of the use for Nike, I can't refuse him to be examined on the theory of the case as presented by the defendants, because I permitted you, over the objection of counsel for the defendant, to examine along your theory, and I think I must allow him to be cross examined on the other theory. He may answer.

The Witness: Would you repeat that question to me, please?

(The last question was read by the reporter.)

By the Witness:

A. I think it would have—I would have a different opinion.

By Mr. Ashenden:

Q. It would be worth more?

A. That is correct.

Q. It would be worth money, wouldn't it?

A. Yes, sir, I think so.

The Court: In other words, what you are saying now is that if you had not had this knowledge which you
130 say you had about the imminency of the use for Nike, you would have attached some value to it?

The Witness: That is correct, sir.

The Court: That is the analysis—

The Witness: The cancellation clause is the vital—

The Court: The cancellation clause would have meant one thing to you, if you had not had this knowledge—

The Witness: Yes.

The Court: —it would have meant a different thing to you, had you not had the knowledge which you say you had concerning the desire of the Government to use it for Nike?

The Witness: Specifically this spot I did not have knowledge. I think it was general knowledge at that time about the Nike situation.

The Court: Well, was it that general knowledge that you were relying on?

The Witness: That is correct, sir.

The Court: That is what I mean. Had you not had that general knowledge you would have given a
131 different answer on the value?

The Witness: That is correct, sir.

By Mr. Ashenden:

Q. Now, this general knowledge that you are talking

about was acquired as of the time that you became interested in this case in 1955, when the Government employed you, isn't that true?

A. Oh, no, I had had that knowledge for before that, because we had worked on some other sites. As a matter of fact, I testified for defendants on some sites very close to this site about a year and a half previously.

Q. You stated, Mr. Witkowsky, on direct examination when you were reciting your interpretations of the documents in this case, as you put it, that one document had an effect and had something to do with your valuation as you finally enunciated it. There was a striking out of the reference to this document. The fact that it was stricken out didn't change the fact that you relied upon that document in your ultimate opinion, did it?

Do you know what I am talking about?

A. I am trying to answer the question so that it won't be knocked out again, if I can. It was one 132 additional nail in the coffin, I might put it that way.

Q. And you still, when you gave your opinion that this leasehold had no value whatsoever, this item was also considered when you arrived at that?

A. I say, this would have been one more nail in the coffin, yes, sir.

Mr. Ashenden: If the court please, I will again ask that this testimony be stricken.

The Court: Ask him whether his answer would save been the same if he had not taken that into consideration. Would your answer still be the same, or would it be different?

Mr. Ashenden: All right, I will ask him that.

Q. If you didn't consider this, would your answer still be the same?

A. It may have—yes, my answer would have been the same.

Q. Well, then, this wasn't a very big nail to put in the coffin, was it?

A. I said it was an additional nail in the coffin, counsel.

Mr. Swanstrom: Why don't you identify it so that
133 we don't have this mystery?

Mr. Ashenden: I think that is all, Judge.

The Court: Any redirect?

Redirect Examination by Mr. Swanstrom.

Q. Did you intend to state that this tenant, this defendant used the property, in your opinion, according to the terms of the lease?

A. No, sir.

Q. Why was the $50,000 expended by the defendant in improvements inconsequential?

Mr. Ashenden: I object as to why. There is no indication that he has any knowledge—

Mr. Swanstrom: He said he would take it into consideration—all right, I will withdraw it.

The Court: He says he didn't take it into consideration. If he had taken it into consideration you would be entitled to go into it.

Mr. Swanstrom: Very good. I think you are right. That is all.

Mr. Ashenden: That is all.

134 Mr. Swanstrom: I have one more expert, and I think everybody is weary of figures, and personally I am pretty well petered out. What do you say?

The Court: Well, as far as I am concerned I am always ready for a recess.

Mr. Swanstrom: I can put this witness on and go through the qualifications, but I am suffering some from this bronchitis.

The Court: You have just one more witness?

Mr. Swanstrom: That is all, one more witness on direct, Mr. Enright there.

The Court: You couldn't complete him tonight anyhow?

Mr. Swanstrom: No.

The Court: I think it is better for the jury to hear his direct and his cross in one session.

Mr. Swanstrom: I think so.

The Court: If it is not too great an inconvenience to him, then we will just wait until in the morning.

Mr. Swanstrom: Could you appear in the morning?

Mr. Enright: I shall, your Honor.

The Court: All right. We will try to start immediately after ten o'clock.

(Whereupon an adjournment was taken to 10:00 a.m., the following day, April 10, 1957.)

135

(Caption—Civil Action No. 54 C 1468)

Before Judge Perry
and a jury,
April 10, 1957,
10:00 o'clock a.m.

Trial resumed pursuant to adjournment.

Present:
Same as before.

(Whereupon the following proceedings were had in open court, in the presence and hearing of the jury:)

HAROLD F. ENRIGHT, called as a witness herein on behalf of plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Swanstrom.

136 Q. Will you state your name?

A. My name is Harold F. Enright.

Q. Where do you live, Mr. Enright?

A. I live at 5006 Washington Boulevard, Chicago, Illinois.

Q. Where is your office?

A. My office is in the Chicago Title and Trust Building, 111 W. Washington Street, Chicago, Illinois.

Q. What is your business or profession?

A. I am a realtor and an appraiser.

Q. In these cases where we ask a man to give opinion evidence, we ask for his qualifications, that is, we search his qualifications and therefore we are asking if you will please tell the court and the jury what your experience has been in the appraisal field.

A. I have been in the real estate and appraisal business in excess of 25 years. I am a member of the Chicago Real Estate Board, the Appraisers Division of the Chicago Real Estate Board. I am a member and a director of the American Institute of Appraisers, a very highly professional technical organization. I am a member
137 of the Society of Residential Appraisers. I am a member of the Illinois Association of Real Estate Boards and the National Association of Real Estate Boards.

I teach evaluation of real estate at Northwestern University, at the Real Estate Institute and the United States Savings and Loan League, and have for many years.

I have appraised property for a large number of banks,

Q. Well, without the terms of this lease, you don't have any experience anyway about the typical operators of airports, do you?

A. That is correct.

Q. So when you say you took into consideration how a typical operator would operate under any terms of any lease, you don't know what you are talking about there, isn't that true?

A. Wait just a minute. I have lost you again.

I have taken into consideration this lease and what effect it would have on an operator—

Mr. Ashenden: If the court please, will you instruct the gentleman to answer my question?

The Court: Read the question again, Miss Reporter. I think he is trying to answer it in his own words.

Mr. Ashenden: I am sorry.

The Court: He is entitled to answer it as he sees 115 fit, as he believes he ought to.

Let the court reporter read the question.

Mr. Ashenden: Excuse me. I think we can save time. I think he understood the question.

Q. Go ahead. I don't care if you start to answer it in your own way.

A. I think perhaps I can answer the question this way, counsel. I know of no operation of a 90 acre sod airport in the Chicago area. I know of no other operation that is in any way comparable to this and in any way in which I could take knowledge from that type of an operation with this particular airport.

Q. Well, do you know of any civilian operation of any civilian airport in the Chicagoland area, or any place else?

A. Yes, I have been involved in civilian—to the extent of having some knowledge, but this becomes a business, and with the business I have absolutely no knowledge.

Q. That is what I am talking about, Mr. Witkowsky.

A. None whatsoever. I am a real estate appraiser. 116 I am not—

The Court: Well, did you make any study of the operation in this case?

The Witness: Your Honor, I started to, and when I came to the facet of the cancellation clause of this lease, it seemed redundant to do it.

Mr. Swanstrom: May I suggest that counsel, I think, has explored this as far as he ought to under the facts that the law provides, that we are not going to pay for any business because we did not take any business, and I can cite a host of authorities on that.

Mr. Ashenden: I object, if the court please. This is cross examination—

Mr. Swanstrom: But you have gone far afield.

Mr. Ashenden: And I have a right to—

The Court: Objection overruled. This is cross examination. You may go into all the witness' testimony.

By Mr. Ashenden:

Q. You have stated that this is, or this was an unusual operation, isn't that true, as far as the property, the 117 airport facility, the barracks apartments and the trailer are concerned?

A. Yes.

Q. In your opinion is this a unique property situation?

A. Well, if you mean by "unique" that you don't find it very often, yes, sir, it is certainly unique.

Q. Can you name, in other words, any other similar operation in your whole experience?

A. No, sir.

Q. By that I mean an operation of an airport, a trailer park and barracks facilities?

A. No, sir.

the Illinois corporation, the Illinois Aircraft Services and Sales Company, conducted this business for a period of 7½ years uninterruptedly, would that have any effect on your thinking?

A. Not after my research led to where it did, no, sir.

Q. Now, assume, if you will, that this lease could be cancelled only if the Government wanted to take back this property for Naval aviation purposes. What effect would that have on your opinion, sir?

A. That could have had some effect on it.

Q. Assume further, then, that the likelihood of the Navy taking this back for Naval aviation purposes, or the Government, rather, taking it back, was extremely remote. Would that have another additional effect on your opinion?

A. If I knew—if I have understood this question, if I knew that it was remote, that this lease wouldn't have been cancelled?

Q. That is right.

A. Yes, sir, it would have had an effect on my opinion.

122 Q. And you probably, if you had studied it under those terms, would have looked more carefully into the question of the operation of the business in arriving at your opinion, is that right?

Mr. Swanstrom: If the court please, this is not proper cross examination. It is assuming some facts that were never brought out at all. There is not a scintilla of evidence here as to whether it is remote or soon that the Navy might again come into jurisdiction over this field.

The Court: I think you are right.

Let me ask you this question. I if understand it correctly, when you found the mere possibility of cancellation in there, when you saw that provision, the possibility of a

cancellation within 60 days, you said, "This has no value". Is that your testimony?

The Witness: Added to the fact that they would have to restore the premises to its previous condition, yes, sir.

The Court: With those two things together you said, "This is a worthless lease", and you took into con-
123 sideration nothing, the length of the time that it had been in operation, and the length of time that it had to go, or you didn't take into consideration the fact of any possibilities, you didn't consider whether it was remotely possible or imminently possible that it would be taken over by the Government, is that right?

Mr. Swanstrom: If the court please, I must say that this is not fair, when you consider the—well, let us be practical. At this time the cold war was about to turn into a hot war, and it is so ridiculous—

Mr. Ashenden: I object to that, if the court please.

Mr. Swanstrom: —for counsel to ask this man whether there has been a remote possibility or not a remote possibility.

The Court: I am asking him merely, and I think the jury is entitled to know what he is basing his opinion on. When he took up the lease and saw the possibility of a cancellation, did he say, "That is it", and it doesn't
124 make any difference whether it is remotely possible or imminently possible that the Government will take it over, is he relying solely upon that provision that is in the lease and not considering anything else except this additional factor which he says that he did consider, and that is the obligation to restore it.

I think he has so testified, and I just want to know if that is all he relied upon. You didn't take the possibilities as being great or slim?

insurance companies, savings and loans, buyers of property, sellers of property, many Government agencies, United States Army, United States Navy, Air Force, many state departments, State Highway Department, Toll Road Commission, City of Chicago, County of Cook.

I have appraised I believe virtually every type of property from vacant lands to residential properties, to apartment properties, commercial properties, industrial properties and airports.

Q. Have you had any experience in appraising what is called leaseholds or rights of possession in property?

A. Yes, sir, I have.

Q. About what has been the extent of that experience?

138 A. Well, there are fewer leaseholds than there are feeholds, and I—

Q. And by feeholds you mean what?

A. I mean the ownership of property in fee.

Q. That is the land itself?

A. That is correct, the title to the land. I would say a lesser percentage naturally are leaseholds. Maybe over the years, oh, fifty or a hundred leaseholds.

Q. Have you served as an officer of any of these professional organizations that you have mentioned?

A. I am a director of the American Institute of Appraisers.

Q. You have been in court, you heard Mr. Witkowsky's testimony yesterday?

A. Yes, sir, I have.

Q. And you know we were referring to that outlying airport at Arlington, Illinois?

A. Yes.

Q. Are you familiar with that property?

A. I am and have been for many years.

Q. If you were asked to describe the property would you add or detract anything from what Mr. Witkowsky said yesterday? He made a rather full description
139 of it.

A. No, sir, I think Mr. Witkowsky gave a very accurate description of the property.

The Court: Maybe the other parties would stipulate then that this witness would testify, if asked the same questions, substantially in the same manner.

Mr. Swanstrom: Well, if he adopts it, would that not be just the same, without asking for their stipulation?

The Court: Oh, yes, just the same. That is a better procedure. Go ahead.

Mr. Swanstrom: I think he has substantially done so.

The Court: You are correct. I did not realize you were going to follow that through. That is better.

Mr. Swanstrom: Thank you.

The Court: Go ahead.

By Mr. Swanstrom:

Q. Did you make an evaluation or appraisal of this property with the intent of arriving at an opinion as to the value of the defendant aircraft company's interest in this property, possessory or otherwise, as of October
140 6, 1954?

A. Yes, sir, I did.

Q. In making that study did you collaborate with anybody? Do you have a partner?

A. Yes, I have.

A. Dominic Dunne.

Q. And do you work together on matters of this kind?

A. Yes, sir.

Q. And when you made this study you collaborated with him?

A. Yes, sir, I did.

Q. And when you came up with your conclusion it was the conclusion of the two of you?

A. That is correct, sir. We both signed the same appraisal.

Q. What factors or elements did you take into consideration in this study and in arriving at your opinion?

A. I took into consideration the property itself, examined the property, examined the buildings. We took into consideration the basic instrument, the lease involved, and I have read that lease and its supplement or
141 extension. We took into consideration the factors, economic and social, that were in effect at the time of our evaluation. We took into consideration the fact that the lease stated that the subject property was of strategic value and that it was to be held in stand-by status. We took into consideration that the times were definitely one of a national emergency, so declared by the President, and we were in a position where it was quite likely that some branch of the federal government would need this property. I took into consideration the non-conforming use that was being made of the subject property,—

Mr. Ashenden: I object, if the court please.

Mr. Swanstrom: Well, it was his opinion that there was non-conforming use. That is what he means.

Mr. Ashenden: That is a legal determination, as to whether there is or there is not a non-conforming use under the ordinances of any particular local jurisdiction. I do not think he is in a position to prejudge any use or non-conforming use under a different ordinance.

142 Mr. Swanstrom: Perhaps he used—maybe his work was not so good, but—

The Court: Objection sustained as to his statement that it was a non-conforming use. The jury is instructed to disregard it.

He may state what actual physical circumstances he

did take into consideration, because he is not called as an expert on law or to give us a legal conclusion as to whether the property was zoned for that particular purpose. He may tell us what he actually took into consideration, the actual facts which he saw.

By Mr. Swanstrom:

Q. You read the purpose for which the property had been leased?

A. Yes, sir.

Q. You examined for what purpose the property was being used?

A. Yes, sir.

Q. And what did you find, regardless of its legal significance, that went into your opinion?

A. I read in the lease that this property was 143 to be used for an airport or for such necessary and incidental uses as an airport. I found that the property was being used partially as an airport and in a large extent as a trailer camp.

That is what I meant, ladies and gentlemen, when I said non-conforming.

Mr. Ashenden: I object to the reference and ask it be stricken.

The Court: Yes, that may be stricken.

Mr. Swanstrom: That may go out.

The Court: That is purely explanatory of what he meant. There is no harm in it, but it may be stricken because he is not the one to determine that. There is no claim in the lease, so far as I know, no claim has been made here that the lease was violated in such a manner that it could be terminated because of the way it was being used.

Mr. Swanstrom: Well,—

The Court: That is not in issue.

Mr. Swanstrom: On account of your Honor's remark, I think I should be permitted to state that when there is a non-conformance, such as if a lease provides you
144 may not keep a dog, and you do keep a dog,—

Mr. Ashenden: I am going to object to this, your Honor. I object to his explanation.

The Court: Let him make his explanation.

Mr. Swanstrom: I think I have a right to, because the judge did not mean to misinterpret—

The Court: Just go ahead and make your statement, counsel.

Mr. Swanstrom: If a lease provides you may not keep a dog, but you keep it, the landlord collects the rent from month to month, he cannot dispossess you because you kept a dog. But he can serve a notice under the law that you must desist from keeping that dog at any time, and then if you persist in keeping the dog he can forfeit your lease.

Mr. Ashenden: This is exactly what I am objecting to, Judge. He is interjecting in here—

The Court: Objection sustained.

Mr. Ashenden: I am sorry, Judge.

145 The Court: The statements are stricken from the record and the jury is instructed to disregard it.

We do not have before us any question of breach of the terms of the lease. That is not what you are called upon to decide.

Proceed. But the witness is entitled to tell you what he found. What is a breach of the lease is not of concern to you, and I am not concerned with it. But he is entitled to tell you what he took into consideration in appraising this property. That is what he called for, to tell what he found as to the value of the property, and he could not properly tell you unless he did tell you those physical facts.

Go right ahead.

The Witness: I took into consideration—

Mr. Swanstrom: Let me say, if the court please, we are not attempting to cancel the lease by reason of this use. I agree with your Honor on that, but I disagree
146 with your Honor's statement—

The Court: Now you have made the statement very clear, clearer than I have. That is it. You are not seeking to cancel a lease because of these things that he is testifying to.

Mr. Swanstrom: But,—

The Court: But he is entitled to show them, so far as taking into consideration how he evaluated the property.

Mr. Swanstrom: And we can ask the court to instruct the jury on the law as I have announced it.

The Court: Oh, yes. The jury will be instructed on the law, but they must have the facts. They will have to have the facts.

The only thing of it, ladies and gentlemen, is that this man does not profess to be a lawyer, he was not called to state what the law is. He is only called to state what the facts are and being a layman he may make a statement that we lawyers would call conclusions. If he
147 does I just tell you about it, that is all. But he cannot testify unless he tells the facts, and that I am ruling he may tell.

By the Witness:

A. I took into consideration the facts that a major portion of this property was being used for a trailer camp, and the fact that this trailer camp had no license, and the further fact that this—

Mr. Ashenden: I object, if the court please.

The Court: It does not have anything to do with the issue here, but it may stand.

By the Witness:

A. I further took into consideration the fact that this trailer camp was in considerable difficulty with the county and state health departments—

Mr. Ashenden: This is objected to, your Honor.

The Court: Just a second. I am going to let it go in but you may cross examine him on it. I think we will let everything go in on this question. Go ahead.

By the Witness:

A. I took these matters into consideration, ladies
148 and gentlmen, because they definitely would be taken into consideration by any investor who was thinking of purchasing the proprietory rights that might have existed at this date, the same as you would consider them if you were considering buying this property, that all of this trouble existed.

I took into consideration the factor that the Government had the right to use up to fifty percent of the landing capacity of the field, that any improvements made upon the property belonged to the Government, and the major fact that the property was subject to a sixty-day cancellation clause, which meant that the tenure of possession was limited to sixty days at any time the Government chose to cancel the lease.

So that all that any investor would be buying would be buying sixty days certain possession; that is all he could get. And knowing of many business and operations and having appraised many of them, it is a fact that the last few months of any operation is a definite decline and a losing period, and any investor thinking that he was buying something for sixty days here would be
149 buying nothing but a lawsuit, a trouble, and a loss, in my opinion.

By Mr. Swanstrom:

Q. Did you take into consideration the provision of the lease that the property had to be restored to the same conditions, not identical, but the same condition?

A. Yes, sir, I definitely did. That would be one of the many liabilities that the purchaser of this lease would be incurring. The responsibility of returning this property into the same condition, not similar, but the same condition it was in at the time of the original lease.

I took into consideration further the factor that I have discussed this matter with Naval officers and personnel, and that there was considerable question if the lease would be—

Mr. Ashenden: I will object at this point, your Honor. He has prefaced his remarks by saying he talked to some third persons. That is pure hearsay and I do not believe he should be permitted to talk about it.

The Court: Objection sustained.

The jury understands that if those Naval officers have opinions about that, let them tell the story so they may be cross examined. Therefore, the hearsay opinions of Naval men will not be presented by this witness.

By Mr. Swanstrom:

Q. Had you had any knowledge or experience relating to the installation or the proposed installation of Nike sites in this territory prior to October, 1954?

A. Yes, sir. It was both public knowledge and specific knowledge on my part that they were coming in. It was written up in the papers, and I specifically appraised several such sites.

Q. Will you give the jury your opinion in dollars and cents as to what, in your opinion, was the value of the defendants' interest in this property as of the date of October 6, 1954?

Mr. Ashenden: I will object, if the court please.

The Court: Objection overruled. You may cross examine him on it, how he arrived at that opinion.

The Witness: Due to the factors, ladies and gentlemen, that I have enumerated, it is my firm convic-
151 tion that this lease would be definitely unmarketable and would have no value.

Mr. Swanstrom: You may cross examine.

Cross Examination by Mr. Ashenden.

Q. In your experience as a realtor and appraiser you say that you did appraise airports. Do you mean by that that you appraised property which was acquired for airports at some later date by the Government, or something like that?

A. And existing airports.

Q. And existing airports for purposes of expansion and that type of thing?

A. It was possible.

Q. Well, in that activity did you have any occasion to make a study of the operational factors of any airport?

A. Yes, sir, we did.

Q. And civilian airports too?

A. City-owned airports.

Q. Well, how about private operations? Have you ever in your experience looked through the opera-
152 tional management of a private airport operation?

A. No, sir, but it would be no different than any other business.

Mr. Ashenden: I will ask that that last remark be stricken, if the court please.

The Court: It may be stricken, and the jury is instructed to disregard it. The answer was, "No, sir."

By Mr. Ashenden:

Q. When did you personally examine this property, Mr. Enright?

A. 1955.

Q. Do you recall what month?

A. No, sir, I do not. The latter part of 1955.

Q. How do you know it was back at that time? Was it that you were contacted by Mr. Swanstrom or somebody else from his office and then you appraised the property after that?

A. I do not recall, counsel, if it was for Mr. Swanstrom or if it was for the United States Army Engineers. I believe it was for Mr. Swanstrom's office.

Q. Had you actually seen the facility, been on the base and seen the facility prior to that time you
153 examined it in the latter part of 1955?

A. I had never examined it particularly but I have been familiar with it for many years. I have never examined it in detail that—

Q. Had you ever been on the base?

A. I cannot swear positively. I possibly was; I do not know.

Q. Had you ever been on it from the time that it was a Navy installation?

A. I think I was, counsel, but I am not sure.

Q. At any rate, you made no particular effort to make any evaluation of it prior to the latter part of 1955?

A. Not of this base, no.

Q. And you had no particular examination of the conditions existing at the time of October 6, 1954 or immediately prior thereto, did you?

A. Only through photographs and my physical examination of the property in 1955, where I could see indications of what had been there.

Q. Well, then, in answering my question, I asked you

whether you had any particular occasion to examine the property as it was in October, 1954, October 6. What is your answer to that?

154 A. I did not examine it that date.

Q. Did you ever examine this operation that was conducted by Illinois Airport Company, defendant here, at any time during the time they were in possession of this lease?

A. No, sir, I did not.

Q. Would you say that the operation, Mr. Enright, of this facility under the terms of this lease was a unique operation, an unusual one?

A. I would not say it was unique. I would say I don't know of any such combination of many uses, but your word "unique," I would not judge that that is a combination of three things that probably do not occur too often.

Q. Do you know of any other similar situation in all of your 25 years in the real estate business?

A. No, sir.

Q. Then would it be unique, in your opinion?

A. I don't know your connotation of "unique." It is the only example of those three things, if that is what you mean, counsel, it is the only combination of the aviation, a trailer camp and the school operation, that I understand was in operation there.

155 Q. Let us take the flying phase of it alone. From a private flying standpoint, civilian,—

The Court: Before we get away from that, so the jury knows it, I do not think there is any real difference between the question and the answer, is there? It is, shall we call it, unusual or unique—

Mr. Ashenden: I think it is just a question of what we mean by a word. He said he does not know—

The Court: He never saw another operation like this. You are trying to confine him to the word "unique," and he does not want to be so confined.

Mr. Ashenden: I think it is just because I said it that he does not want to agree, Judge.

The Court: Oh, no. What you are trying to find out is whether this is the only instance of that combination that he has ever come across.

By Mr. Ashenden:

Q. And you said that that is the case?

A. That is correct.

156 The Court: Now I am sure the jury understands what the question and the answer are. All right.

By Mr. Ashenden:

Q. Let us confine ourselves now just to the private airport operation, Mr. Enright. Of all the property in Cook County, do you think you can tell me how many private airports there are?

A. Not exactly. I would estimate there probably are a dozen, approximately.

Mr. Swanstrom: Had he not better relate it back?

By Mr. Ashenden:

Q. In October, 1954. Would you say it was approximately the same?

A. Approximately. A dozen or a dozen and a half, perhaps.

Q. Do you know how much area is in all of Cook County, for example, in the way of acreage,

A. I have not computed it, no, sir.

Q. Can you give us a general figure,

A. No, sir. It is a large number of hundreds of square miles, not acres.

Q. All right.

157 A. Multiply it by acres and you have a real big boxcar number.

Q. Would you say that private airports, civilian airports, as such, apart from trailer facilities and that type of thing, but just those locations as such, are—we will use any word you want to use—unusual property as compared to all other types of property, in the Cook County area?

A. No, sir.

Q. Well, you say there are only a dozen or a dozen and a half?

A. Approximately. Nothing unusual about them.

Q. As compared to other types of property, this is what I am getting at, is that type of property unusual property?

A. No, sir.

The Court: There are an extremely small number of them compared, for instance, to residences?

The Witness: That is correct, sir.

The Court: Is that what you have in mind?

By Mr. Ashenden:

Q. There is an extremely small number of them as compared to apartment buildings?

158 A. That is correct.

Q. And factories?

A. Correct.

Q. And just about any other type of improvement you could name, is that true?

Mr. Swanstrom: Airplanes are more modern than architecture.

By Mr. Ashenden:

Q. Isn't that true?

A. You could name any type of a special type of property, you might say a brass foundry, how many brass foundries are there, and—how many are there in Cook County?

Q. But that is a manufacturing use, is it not?

A. One type of manufacturing use.

Q. I am talking about a general classification of airport use.

A. There are fewer of them than there are total number of factories.

Q. Well, would you say that there are fewer of those uses than any other kind of use, in your knowledge?

A. Oh, no, counsel. There are much fewer dog pounds, let us say, or fewer courthouses, or fewer, any num-
159 ber of other uses. There are fewer of them, as the court says, than there are residences or apartments or others.

Q. Let me ask you this then, Mr. Enright. Is it not a fact that in most zoning ordinances, both the Cook County zoning ordinance and the zoning ordinances of villages and cities in the whole area, that in most of these ordinances, airport uses are designated as special uses?

A. That is correct.

Q. Isn't that true?

A. That is true.

Q. I am talking now about uses of property as related to a zoning ordinance, and an airport use is considered in your mind, is it not, a special use?

A. It is.

Q. And what does special mean? Can you describe that?

A. Special use is a use other than the uses than can be put to property under other types of zoning, such as residential or apartment or commercial or industrial or trucking. Airport zoning is a special type of zoning.

160 Q. I think you have answered my question.

A. Thank you.

Q. Did you take into consideration that factor that this is a special use, in determining your valuation here?

A. Yes, sir.

Q. Did you take into consideration—have you had an occasion, Mr. Enright, to examine the books and records of this Illinois Aircraft Corporation?

A. No, sir, I have not.

Q. Isn't it common and ordinary and customary appraisal practice, when you are dealing with what is called unusual or unique property, to take into consideration any element in arriving at the market value? Isn't that the custom?

A. If I felt the tenure was long enough to warrant it I definitely would say it was the custom.

Mr. Ashenden: I will ask the answer be stricken and ask the witness specifically to answer that question.

The Court: I think that is a helpful answer. The witness is saying, "Yes, he would take it into consideration, but in this case he is basing his whole theory on the fact that he says that sixty days is all they had within which to operate."

161

Mr. Ashenden: All right.

Q. Is it not a fact, Mr. Enright—

The Court: You may ask him, or you have asked him already if he did take it into consideration and he said he did not take it into consideration, and then he told you why he did not take it into consideration.

By Mr. Ashenden:

Q. But it is common appraisal practice when you are talking about unique property or unusual property, to take into consideration any factor in arriving at the market value isn't that true?

A. Whatever the tenure is long enough to warrant it.

Q. And if, for example, this lease—assume then that

this lease could not be cancelled except for any other reason than, for example, violation of the terms of the lease directly or for purposes of Naval aviation, would you have taken into consideration the financial books and records of this company in the operation?

A. I took that into consideration and I have the
162 same answer. The property has no value.

Q. You said, Mr. Enright, that you did not take into consideration the financial statements, that you did not examine them.

A. That is correct.

Q. I am asking you now, sir, to assume that the lease could be cancelled only in the event the property was to be acquired by the Government for purposes of Naval aviation or in the event they did not live up to the terms of their lease specifically. I am asking you on that assumption now, here I am lost again—

Mr. Swanstrom: You are all through.

Mr. Ashenden: I did not finish the question, sir, and you interrupted or tried to—

I think I can finish it now.

Q. Would you take that into consideration, would you take the operation of the—

The Court: Would he have taken.

By Mr. Ashenden:

Q. Would he have taken it into consideration?

A. Now you have lost me too.

Mr. Swanstrom: If the court please, I have always
163 understood that you do not ask hypothetical questions except that they be based upon some elements of fact in the record. There is nothing in this lease that indicates in the slightest that it could be cancelled only for Naval operations, and I think that the answer to the question is improper.

The Court: I have ruled, counsel, that there is. So he may answer the question.

By Mr. Ashenden:

Q. Do you have it now, Mr. Enright?

A. No, sir, I am very lost.

The Court: Maybe you had better get the lease and read to him the provision.

Mr. Swanstrom: Read him paragraph 14.

The Court: Read him paragraph 14 and ask him on your theory of the case.

Mr. Swanstrom: Here it is.

Mr. Ashenden: He has already given his opinion about paragraph 14, Judge.

The Court: Yes.

Mr. Ashenden: I think I can put it to him so he will understand.

164 The Court: You put it the way you want to put it. Then if there is objection I will rule on it.

By Mr. Ashenden:

Q. Mr. Enright, assuming that this lease could be cancelled only in the event the Government decided to take this field for purposes of Naval aviation, assuming that that was the only basis of cancellation, or unless they violated some other term of the lease that is not in issue here; assuming that, would you take into consideration the operation of this airport; in other words, the finances, the books and records? Would you have taken that into consideration?

A. No, sir, I definitely would not, because the same 60-day cancellation privilege exists.

Q. In other words, then you feel that if it could be cancelled only for purposes of Naval aviation, that it was a very definite possibility that it could have been cancelled for Naval aviation purposes in October, 1954?

A. Knowing the Government, counsel, the way they operate, I read the lease to say that the Government could cancel, meaning any branch of the Government.
165 If you are saying that it is only the Navy, I know how they transfer property back and forth, and I definitely understand that and I think any investor would understand that, and with the threat of 60-day cancellation hanging over their head it would affect the market so we would have no marketability of the property whatsoever.

Mr. Ashenden: Can we strike the speech, your Honor, as not being responsive to the question?

Mr. Swanstrom: It is quite responsive.

The Court: The question has not been answered.

By Mr. Ashenden:

Q. Will you answer my question?

The Court: And the jury is instructed to disregard it. Read the question.

(The last question was read by the reporter.)

By Mr. Ashenden:

Q. Do you believe, in other words—you just said that regardless of the fact that it could be assumed that it could be cancelled only for that purpose, that you would still
166 think it was valueless?

A. That is correct.

Q. In other words, you felt that the Navy quite possibly and probably was going to take it for Naval aviation purposes in October of 1954?

A. That is correct.

Q. I will ask you to examine Defendants' Exhibits for identification 1, 2-A and 2-B, if you will.

Mr. Swanstrom: The same objection as I made previously, your Honor.

The Court: Objection overruled. You may show him the documents.

The Witness: I have examined them.

By Mr. Ashenden:

Q. Would you tell me, after examining these exhibits, it is still your opinion that the Navy quite possibly was going to use this airport for Navy purposes anyway, Naval aviation or otherwise, in October of 1954?

A. Those exhibits indicate that the Navy did not intend to use the property.

Q. For that or for any other purpose at that time, is that right?

A. Those exhibits indicate that.

167 Q. Yes, sir.

A. I know further—

Q. That is all I asked you, by the way.

A. All right.

Q. You were telling us something about this trailer camp operation, trailer park operation. You learned, did you not, or whatever information you are using—in the first place, let me ask you, do you know of any court finding that showed a violation and a conviction of a violation of any state, local or other body against this operation of a trailer camp?

Mr. Swanstrom: Objection.

Mr. Ashenden: I am entitled to go into that.

The Court: I think he is entitled to cross examine him, because the witness stated he knew of trouble they were having, and—

Mr. Swanstrom: Oh, I know, but how many things are there that no court—sometimes there are reasons why there is no court action.

168 Mr. Ashenden: I will ask that this be stricken.

The Court: That may be stricken. He is entitled

to know whether the proceeding went far enough so there was a judgment of some kind or other. That is proper cross examination and he is entitled to know what the witness found out or knows about it. He may answer.

The Witness: I know of no court action.

By Mr. Ashenden:

Q. Do you know of any action that was undertaken by any enforcing officer such as—strike that question—by the State's attorney of Cook County or by any city prosecutor?

A. I do not know of any action by the state's attorney or his prosecutor.

Q. You are then basing your statement about this trouble that you talked about on what somebody else told you apart from any court activity, isn't that correct?

A. And documents. But no court activity. Documents from the county and the state, and discussion with the officers and other individuals.

Mr. Ashenden: I will ask, if the court please, that 169 his previous discussion about this be stricken, for the same reason, that it is hearsay evidence.

The Court: I know, but on your own cross examination you brought this out, counsel.

Mr. Ashenden: Well, I brought it out to show it was hearsay, that he heard it from other people who have not testified here.

The Court: I know, but the jury is entitled to weigh his evidence, as to where he got his information.

Mr. Ashenden: All right.

The Court: It may stand. Your objection goes to the weight of the whole of his testimony and not to the admissibility of it. Go ahead.

When we speak about weight of testimony we speak of what the jury thinks it is worth.

By Mr. Ashenden:

Q. You said that it was public and specific knowledge in 1954 about this Nike situation. As a matter of fact, was it public and specific knowledge, Mr. Enright, 170 honestly, where the Government was going to locate these guided missile sites?

A. Not the locations, no, sir. Only in general that they should be a flat tract of land where we can get a line of sight from our radar to the Nike.

Q. This is called the plain state, Illinois, most of the property in Illinois is flat property, isn't that right?

A. That is correct, most of it is.

Q. So, as a matter of fact, the location of these guided missile centers, these Nike sites, was probably one of the most secret things that was kept in 1954 by our armed forces, and particularly by the Signal Corps, isn't that true?

A. No, sir, they couldn't keep it a secret. They are such large installations that they are open to anybody to see. They were not published, except in the Tribune, the Daily News and the Sun-Times.

Q. What I am trying to get at is, before the acquisition, the actual acquisition and beginning to install the particular site, obviously after that they would have to let people around know, but prior to that time when they are setting up plans and that type of thing, was this 171 not very highly secret as to where these would be located?

A. No, it was not secret. It was restricted. The lowest classification.

Q. Would the ordinary civilian be entitled to know this information?

A. No, sir.

The Court: What does restricted mean? To whom would

the knowledge go? I think the jury is entitled to know that.

By Mr. Ashenden:

Q. Who would know this?

The Court: Who would be entitled to know when it is classified as restricted?

Mr. Swanstrom: I doubt very much that this witness is qualified to answer the question.

The Court: Well, he can say so. The witness can testify. If he does not know the answer that is all right too. We cannot ask him to answer something he does not know.

Mr. Swanstrom: He has only testified to general knowledge that we were afraid of Russia and we
172 were going to fortify this location.

Mr. Ashenden: If the court please, I object to this speech.

The Court: It is a part of his argument. You are entitled also to make a speech once in a while, counsel. It is all right.

Mr. Ashenden: But I am trying to refrain for doing it.

The Court: It is not part of the testimony.

The jury will understand that what the witness says is important, and a lawyer is entitled to express his opinion once in a while. Maybe a lawyer does it a little bit too much sometimes, but we all do. The judge does too.

Mr. Ashenden: Let me go as it this way then, that—

The Court: We have had so much discussion here and he has not yet been able to tell us whether he knows what restricted means or not. I myself do not know. I could not answer the question.

By Mr. Ashenden:

173 Q. Do you know of your own knowledge?

The Court: He may be able to know just what that classification is. The fact that he says it was the

lowest type may indicate he might know what that means. He may answer if he knows.

Mr. Ashenden: I don't know either, Judge.

Q. Do you know, Mr. Enright?

A. Yes, sir.

Q. Well, what does it mean?

A. There is nothing restricted about my telling you what restricted means.

The Court: No, I am sure there is not.

The Witness: Army, Navy and the Air Corps, of which I was an officer in World War II—by the way, when I told you I was 25 years an appraiser, I forgot to say that there was a void in there of 4½ years when I was in the Army.

Mr. Ashenden: Most of us had that same kind of a void. Go right ahead.

The Witness: Well, it was there. In the last two years they had me appraising on crutches.

174 "Restricted" is the lowest of classifications. Material that is not to be dispersed and published and read in the papers, is restricted. There are various classifications. The word restricted is the lowest kind. That means anybody in the military or the Army or any of the services can know about it, can read it, and it is handed about in bookets. But in general it is not published in the newspapers.

The next classification is confidential. That is material that is still more strictly restricted.

Then comes secret. Then comes top secret, and then comes—I cannot whistle—it is top, top secret. But "restricted" is in general—

The Court: Well,—you mean it was not supposed to be published in the papers and not to be generally disseminated to real estate men, and appraisers in general?

The Witness: But it was.

By Mr. Ashenden:

Q. Just a minute. Would not somebody who did
175 this be violating the law?

A. We often felt that they were, various newspaper articles. We would be told things that were secret—

Mr. Ashenden: I object as not responsive, your Honor.

The Court: Let him answer the question.

By Mr. Ashenden:

Q. Would they not be violating the security law?

A. Technically, unless a restriction was withdrawn.

The Court: Technically they would?

The Witness: Yes.

The Court: All right, go ahead.

We got off on something which does not have much to do with the issues in this case. We have spent about ten minutes on that. Let's get back to the case.

Mr. Swanstrom: I tried to stop it.

By Mr. Ashenden:

Q. Did you ever talk about this to other people in violation of the security of your country?

A. It is possible.

Mr. Swanstrom: I think there is a limit even of cross examination.

176 The Court: Objection sustained. The answer is stricken.

By Mr. Ashenden:

Q. You said that you took into consideration quite seriously this restoration cost. You said also that you had not seen or had not examined the field or the installation until the latter part of 1955.

A. That is correct.

Q. How can you tell us what the restoration costs would be if you did not know what it was like in 1947 when these people took over this lease?

A. I could only tell from photographs I saw of work that had been done of a temporary nature in the barracks and other work around the field which I knew would be costly to remove and would put the property back in the same condition. This work that was done was of no value to the Government and could not be removed and its restoration would be a costly matter that a buyer would have to assume and would be very reticent about assuming.

Q. You did not actually see the thing itself?

A. No, sir.

Q. You are talking about some photographs you looked at?

177 A. Plus the visual observation and inspection of the barracks and hangars, and I could see on the walls, matching them up with the photographs of what had been there, whether they were partitions, paper board partitions, and things of that sort.

Q. You said that a major portion of this property was used for a trailer park. Actually there were 94 acres out there, weren't there, 93.36 acres?

A. I believe, counsel, I did not mean to say that a major portion, meaning area of the land, of the ground, was used for a trailer park. I said a major portion of the operation appeared to have been trailer operation, a hundred-some trailers.

Q. What do you mean by operation?

A. The, shall we say, gross income from the operation.

Q. You have not even seen the papers. How do you know about the gross income?

A. I can assume that if there is a hundred and some trailers that it had a certain amount of income to it.

Q. Do you know anything about how a private airport operates from a flight income situation? Do you

178 know what the flight income is in an airport like this?

A. I did not examine the books.

Q. Do you know what the rentals were in the barracks?

A. No, sir, I do not.

The Court: I think we will take a short recess.

The witness will leave the stand but, being on cross examination, will not discuss his testimony with anybody.

(A short recess was taken.)

By Mr. Ashenden:

Q. Let us back to what we were just talking about, Mr. Enright.

You said that in your opinion the biggest portion of the income of this operation was in connection with the trailer facility, is that right?

The Court: I do not think that is exactly what he said. I think he did not say anything about that income.

Mr. Ashenden: I think he did, Judge.

The Court: Maybe so. Maybe I am wrong. I did not understand him to say anything about the income.

179 I thought he was talking about the operation.

The Witness: That is correct, sir. I believe I said a large part of this operation was a trailer camp.

By Mr. Ashenden:

Q. Didn't you say anything about income?

A. Not to my memory, counsel.

Mr. Ashenden: Mr. Reporter, if you can read the last portion of this man's answer it will clarify everything.

The Court: Ask him what his idea is about income.

By Mr. Ashenden:

Q. In other words, when you are talking about the operation you are talking about what it meant money-wise to the operators, isn't that it?

A. I was thinking about the major portion, counsel, of the operation, to do with the total operation. I did

not get into the dollars and cents in the business and they were not taking a business.

Q. When you talk about an operation what do you mean by that?

A. The physical operation of the flight portion 180 and the trailer portion. I did not go into the dollar amounts of those items.

Q. I know you did not, but—

If the court please, I prefer to have this answer read. He said something about income.

The Court: You are entitled to have it read back.

Mr. Ashenden: I would like to have read back the last portion prior to the recess.

(The last several questions and answers before the last recess were read by the reporter.)

By Mr. Ashenden:

Q. Let us talk about this income. You said the major portion of the income in your opinion was from the trailer operation.

A. I said a major portion of the total income. I do not know what the total income was, but a major portion, a large segment, shall I say, of the income must have come from the trailers.

Q. From your experience as an appraiser can you give us an estimate, looking at the site you saw, the number of trailers, what this gross income from the trailer operation could have been?

181 A. Yes, sir, I could.

Q. What?

A. The income from a trailer operation is dependant upon many things, much like income of various apartments depends on many things. The cleanliness of the site, the sanitary facilities, the condition of the buildings,

the outbuildings, a large number of factors. In general I know how much trailers rent for. I did not see these facilities in 1954, but I am basing my judgment upon what I have been told about these trailers and photographs of the trailers in this period of time.

Q. I just want you to give me a figure of what you estimate the gross income from the trailer operation would be. Can you do that?

A. In general, trailer rentals run a gross income of between 20 and 35 dollars per trailer per month.

Q. How many trailer sites were on this property?

A. I do not know exactly. In excess of 100.

Q. Do you have an opinion as to what the gross income from the flight operation would have been?

A. No, sir, I do not.

Q. Do you have any knowledge, drawing on your 182 experience, as to what a flight operation normally brings in?

A. Again it depends upon the services performed, the facilities supplied, whether they are in hangars, whether they are gassed, whether they are serviced, many, many factors. I do not know, counsel, what services are performed. I best answer your question, I do not know what your income was from your flying school.

Q. Well, if you do not know what that income could be how can you draw any ratio between the income from trailer operation and the income from flight operation?

A. I drew no ratio.

Q. You said it was a large segment of it.

A. A large segment.

Q. And you did say once a major portion of it too. Does that mean it was bigger than the flight operation?

A. If I said a major portion I meant to say it was a large part, not necessarily more than the flight. It was

some sizable piece of the total income was from trailers, was my assumption.

Q. You could have meant it was a lot smaller than
183 the flight income too, couldn't you?

A. It was entirely possible.

Q. As an expert being familiar with an airport operation, generally, as you stated, can you give us any inkling of what an airport can derive from flight income in any airport in the Chicago area?

A. I appraised the O'Hare International Airport, probably the largest in the world. In connection with that airport appraisal I drew data on some twelve or thirteen airports, of their income, their landing fees, their services, and many, many factors.

I appraised the—there is no income from the Glenview Airport. I cannot give you any figures of private income of your port, sir, that would be helpful to me, nor an estimate of how much you grossed. I do not know what you handled.

Q. You say you appraised O'Hare. Did you do that for the City of Chicago?

A. I either did it for the City of Chicago or for the Corps of Engineers, or possibly both.

The Court: Is there any accepted standard, according to the number of airplanes landing at a field, is there
184 any kind of a rough guide by which you can estimate the gross income, by the number of airplanes landing at a field, or anything like that, that you know about?

The Witness: It varies with the weight of airplanes, the frequency of service, the services supplied, the type of the airport. This was a sod airport, this was a dirt airport, not a port for large planes.

I am not familiar with what your rates were nor your income.

By Mr. Ashenden:

Q. You are not familiar with the income of any private flying operation?

A. That is correct.

Q. O'Hare is going to be one of the biggest airports in the world, is that correct?

A. That is correct.

Q. You cannot compare that with any figures from any private flying operation?

A. You are correct.

Q. And it is a different commercial airline type of operation as opposed to a flight instruction type of operation?

185 A. Definitely.

Mr. Ashenden: I think that is all.

Redirect Examination by Mr. Swanstrom.

Q. There was some talk about the zoning of special businesses. You mentioned several. Did you want to mention anything about trailer camp zonings?

A. Yes, sir. Trailer camp zoning, the State of Illinois, County of Cook, requires special licensing on special types of zoning upon which a trailer camp can be located. You cannot locate a trailer camp on all types of zoning.

Q. You also were asked, and I do not think you were permitted to finish, this business of transfer of facilities or properties from one department to the other, that you were familiar with that law. Is that the law which you heard me read the other day in court?

A. Yes, sir, I heard you read it and I am familiar with it from the practical standpoint of transfers of large numbers of property.

May I explain further on that, sir?

186 Q. Go ahead.

A. Before property is transferred, the usual cus-

tom is that the using arm of the service states that that arm has no further use for the property and that arm declares the property surplus, at which time any other using arm, such as in this case the Army, picked it up, they had a use for it, a very definite use for it, and they have a right to have the property transferred to it, as it was. The fact that they had a need and they were going to use it is proved by the fact that they did take it.

Mr. Ashenden: I object.

The Court: The last sentence, the last statement, is stricken.

May I ask you this: When one arm of the Government takes over or acquires a piece of property from another arm of the Government, it acquires the exact same rights, does it not, nothing more and nothing less, than the arm which conveyed it?

The Witness: That is my understanding exactly, sir.

By Mr. Swanstrom:

187 Q. In other words, the lease with all of its provisions that encumbered this property, would still remain on the property?

A. Absolutely.

Q. You were asked if you knew of any court action, and you said you knew of no court action to prevent the operation of this trailer camp, and then you were interrupted and not permitted to complete your answer. Have you an explanation of your answer given at that time or anything to amplify it?

Mr. Ashenden: I object to the statement that he was interrupted. He answered the question fully.

Mr. Swanstrom: All right, I will withdraw that. His mouth was open, and so I understood—

Q. Did you have anything further to say in reference to the fact that you had known of no court action, no lawsuit in court, in reference to this trailer camp?

Mr. Ashenden: I object, if the court please.

The Court: Objection sustained. You are attempting to open up hearsay. You can ask him what, if any, 188 documents he saw, something specific, something like that. That will give the other party an opportunity to know what the answer is.

Mr. Swanstrom: Very good, Judge. You have a clearer conception of that than I have. Would you ask him?

The Court: You mentioned that you saw certain documents. What documents did you refer to?

The Witness: I saw letters, your Honor, from health authorities, state and county, stating that there was no license on this property, that in order to obtain a license they had to do extensive remodeling, repairing, alterations, of very costly nature, in order to obtain a license.

Mr. Ashenden: At this time I object to this type of an answer.

The Court: Objection sustained to all except the first part of the answer, that he saw letters, because the letters themselves are the best evidence. The jury is instructed that if there is going to be any evidence concerning 189 what conditions were, and there are written documents, the rule of the best evidence requires the production of those letters if they are material in the matter. So the first part of the answer, that he did see letters from the Health Department, that stands. You may consider it. But as to what those letters contained or purported to contain, the best evidence would be the letters themselves and you are instructed that the latter part concerning their contents is stricken, you are instructed to disregard that. If it is material you would have it in the form of the letters themselves.

Mr. Swanstrom: Very good, your Honor. I have served notice on counsel to produce, and I expect to introduce them on the rebuttal.

That is all.

The Court: Are there any other questions?

Mr. Ashenden: One more question.

Recross Examination by Mr. Ashenden.

190 Q. The fact that this company, Illinois Aircraft Company, operated with the very same clause in the lease for a period of seven and a half years, did you take that into consideration in arriving at your evaluation?

A. Yes, I definitely did.

Mr. Ashenden: I have no further questions.

The Court: I don't want the jury to think we are being technical, but that is one of the fundamental rules, about hearsay and about written documents. Where a written document becomes important we must produce that document. It is not an implication that the person who saw it might not say exactly what is in it, but the rule is that the other side has a right to examine it and to see it.

You may be excused.

(Witness excused.)

Mr. Swanstrom: If the court please, the Government rests.

Mr. Ashenden: If the court please, not knowing in any case in what order the witnesses will appear, we did have here Mr. John Wilson, who made a special trip to be
191 here, and may we take him now and try to finish up with him before the recess?

The Court: We will do our best, we will take him now.

Mr. Ashenden: We will call Mr. John Wilson.

JOHN WILSON, called as a witness herein on behalf of defendants, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Ashenden.

Q. State your name, please.

A. John Wilson.

Q. Where do you live?

A. Sky Harbor Airport, Northbrook, Illinois.

Q. What is your business or occupation?

A. I am president of Midstates Aviation Corporation, operating Sky Harbor Airport.

Q. How long have you been in that capacity?

A. In that capacity since June of 1945.

Q. How long have you been connected with the Sky Harbor Airport?

A. That same period of time.

Q. Will you tell us of your background in the 192 field of aviation, your qualifications as an expert on aviation, sir?

A. Soloed in 1921; Universal Aviation Corporation Schools in airline operation until 1931; American Airways, forerunner of American Airlines, 1931 and 1932; Lewis School of Aeronautics, Lockport, 1932 to 1943;—

Q. What did you do in connection with the Lewis School?

A. I was its superintendent in charge of aviation and other activities there.

Q. All right, go ahead.

A. Army Glider School, as contractor, Lumisa, Texas; executive director, National Aviation Trades Association.

Q. What is that, Mr. Wilson?

A. That is the operators' association throughout the United States.

Q. A national organization?

A. And from there to Sky Harbor on the date I mentioned.

Q. In connection with your operation at Sky Harbor, sir, what are the activities that take place in that airport?

A. We run an airport, privately owned airport,
193 for public use, flight training, charter and air taxis, sales of aircraft, storage of aircraft, dispersion of gas and oil, sales of aircraft, run a small restaurant and shops in connection therewith, propellor shops, radio shops, and whatnot.

Q. In connection with the sales of aircraft do you have a franchise set up with any other locations?

A. Yes. We are distributors for Cessna Aircraft in the northern third of Indiana, Illinois, and some counties in Iowa, and as such have eleven dealers under us located at airports throughout that area.

Q. What would you say is the gross income from your operation?

Mr. Swanstrom: I object to that. It is immaterial and—

The Court: He is merely qualifying him now.

Mr. Swanstrom: No, he is through with that. He is asking him what the income from this business is.

The Court: That is right, and it is the same kind of business.

Mr. Swanstrom: I object to it as immaterial and only leads to the objection of consequential damages.

194 The Court: Objection overruled, it has nothing to do with this case. But it does help the jury understand what this man knows about the operation of that type of business.

Mr. Swanstrom: Restricted to that, I have no objection.

The Court: That is all it is for. It has nothing to do with the case at issue. It is merely as to qualifications, his background. Counsel is right on that, it is limited. All right.

The Witness: Gross income last year was $2,300,000. There has been constant growth since 1946 from about $120,000 to this figure.

By Mr. Ashenden:

Q. And back in 1955 and 1954?

A. 1954 income roughly, as I remember it, was $830,000.

Q. And in 1955?

A. $2,300,000.

Q. These franchise dealers you are talking about, 195 with respect to the sales of aircraft only, these franchise dealers, are they other airports, smaller airports around in the area, or other sized airports?

A. Yes, Moline, Fort Wayne, Aurora, Du Page, Palwaukee, and many smaller airports, there are some eleven of them in the area.

Q. Would you tell us what the situation is with respect to supply and demand of those dealers and what it was in 1954?

A. My income curves upward, showing that demand in dollars and in units is steadily increasing.

Q. Are dealers easy to come by from your standpoint?

A. Good dealers are not. You pick those dealers after long knowledge and experience with them.

Q. What particularly with respect to those dealers do you take into consideration?

A. Location and potential, ease of access to that location, its population potential and nearness to centers of population where the product has some saleability.

Q. What does the average of these eleven or twelve dealers that you have, what is the average net income from the sales of aircraft operation only?

196

Mr. Swanstrom: I object to that, your Honor.

The Witness: You are asking for net income?

Mr. Swanstrom: Same objection.

The Court: He may answer in the same way, just giving his background.

Mr. Swanstrom: This is not as to his background. He is now going into the business end of this. He has shown that he is an expert on the operation of airports, and—

The Court: Will you admit he is an expert?

Mr. Swanstrom: Certainly, on running his business.

The Court: Counsel, the Government has stipulated that the man is qualified to testify as an expert in this field. So his objection will be sustained as to his own operations.

The only purpose of it, so the jury understands, was simply to qualify him. When the Government admits that he is qualified to testify on this matter there is no point in going into it further. All right.

197

By Mr. Ashenden:

Q. Were you familiar with the operation of Arlington Airport, as it was known, which I think we can stipulate for the purposes of just naming here, is the same airport in question, were you familiar with the operation of Arlington Airport in 1954?

The Court: Was that the common accepted name of the property in question?

Mr. Swanstrom: That name is okay for this purpose.

Mr. Ashenden: Yes.

The Court: All right, for identification.

Mr. Swanstrom: Yes.

The Witness: Yes.

By Mr. Ashenden:

Q. Will you tell us how you were familiar with it, Mr. Wilson?

A. I never viewed the books and records of that operation. I called there, however, a number of times.

198 I knew the operators of the airport, as I know many of the operators in the State of Illinois and in the United States. I called there quite frequently to see what they were doing, with the idea of selling them airplanes.

Q. What can you say with respect to the facilities, the physical facilities, as compared to other airports, other private airports in the area?

A. I believe—

Mr. Swanstrom: I think, your Honor, he ought to say what he can describe about the facilities.

Mr. Ashenden: All right.

The Court: Objection sustained. Reframe the question and let him describe what was there.

By Mr. Ashenden:

Q. Can you do that, Mr. Wilson?

A. An adequate flying field for the purposes of non-scheduled aviation, a very adequate training base for the type of training that was going on, and with population potential, that led to a good business at that location; I considered it a very adequate and good operation.

199 Q. Can you describe physically what the hangar was like there?

A. Wood truss, double story on the office portion of the building, and very satisfactory building for maintenance, sales, student instruction and that type of thing, in my estimation.

Q. Can you name any other private airport in the vicinity that has as good a hangar physically in your opinion?

A. I don't think I can within a reasonable radius. We have the Sky Harbor. Palwaukee has. But they are a rarity and not a common thing.

Q. In addition to that, was there any other building, major sized building on the premises?

A. Yes, An old barracks building converted into apartment buildings, was the other major structure, as I remember it.

Q. Was there any other activity going on there in 1954 and prior thereto by this company, that you were familiar with?

A. I observed a trailer park in operation there, unusual for an airport.

Q. In your opinion how did the operation, from a flight standpoint only, of Arlington Airport, compare with
200 the operation of any other private airport in the vicinity?

A. Will you please state the standpoint again, from what standpoint?

Q. Flight operation only.

A. I think they were doing a very good business on flight operation under the GI bill.

Mr. Swanstrom: If the court please, I do not like to make these objections, but here are superlatives, general statements, conclusions. We all know that is not proper.

The Court: Objection sustained.

Mr. Ashenden: We will try to do it in accordance with the rules of evidence.

Q. Can you describe the flight school or flight instruction operation generally in the area, not only in Arlington but all the other civilian airports in this area?

A. At the present time?

Q. The civilian flying and GI flying, can you tell us what flight instruction—how that developed over a period after the war?

A. It developed amazingly in point of hours flown and the use of aircraft. Civilian flying and civilian
201 instruction have done exactly the same thing. People want to learn to fly, want to learn the use of this new medium. Under the GI bill after the Korean War there was a tremendous upsurge on the part of all operations.

Q. How about the GI's from World War II?

A. That is the one I am referring to, and the Korean Bill. The World War II caused a tremendous upsurge, and Korea followed it on.

Q. When did Korean eligibility on GI flying start?

A. I can't give you the exact date.

Q. What year?

A. 1955, I believe.

Q. In your opinion as an expert on aviation operations what would be the minimum net income for the combined activities at Arlington Field for Korean GI flying, non-veteran flying and aircraft sales, in the period from October 6, 1954 to May 2, 1957?

Mr. Swanstrom: I object to that, your Honor, as entirely speculative and immaterial. The Government has not taken any business in this case. Nothing can be compensated for except what we have taken. This
202 is utterly speculative and I object to it.

The Court: Read the question.

(The following portion of the record was read by the reporter:

"Q. What would be the minimum net income for the combined activities at Arlington Field—")

Mr. Ashenden: Would you change that to "gross income"?

The Court: I should say so, yes. The objection will be sustained otherwise. Now gross income.

I agree with counsel that the Government is not taking a business. On the other hand, the question of the value of the leasehold cannot be determined, I believe, except by determining the possible loss that might accrue—

Mr. Swanstrom: Of course the Circuit Court of Appeals in this Circuit has held otherwise. They have said you cannot use past or future earning as an element in fixing compensation, and there are many that. One reason
203 is that it depends upon the skill, whether the operators stay alive, and all kind of conditions. I can cite a host of authorities on that.

Mr. Ashenden: If the court please, I think—I can cover this one phase of it.

Both of the Government witnesses have stated that this is unique or unusual property. I think the authorities are unquestioned in the sense that where you have unique property as such—and they also stated that it is common appraisal practice, where you have unique property, that any method of determining value can be employed in arriving at the fair market value. We do not seek to recover loss of anticipated profits here. We are seeking only to arrive at a valuation of this leasehold for the balance of the term. We cannot do it in a vacuum, your Honor. We are going to have to look at the operation of a unique business. The theory of these cases is that with respect to unique property we are entitled
204 to go into this type of thing.

Mr. Swanstrom: But you will have to go back and remember what the witnesses and this witness have said about the uniqueness. The uniqueness is that there was a trailer camp affixed to this proposition. He said it was unusual to have a trailer camp. That is where your uniqueness is, and that is something that, being unusual and not authorized under the lease—it is a question that

is going to be, I hope, settled, that you have no business to run it, and—

Mr. Ashenden: I object to that.

Mr. Swanstrom: —and, therefore, the uniqueness cannot apply here, according to the cases.

Mr. Ashenden: I think when we talk about the operation of an airport only, there are only fourteen such locations in the whole of Cook County, the zoning ordinances of all of the villages and all of Cook County itself even designate a special use for this purpose. The cases have held that railroad terminals, churches, schools,
205 things of that nature, are special uses, because there is no readily available market for this type of thing because of the use.

I think that when we talk about fourteen—in his mind, a dozen or so of these things in all of Cook County—I think this certainly establishes it as unique property. There is no other method of determining value here, Judge.

Mr. Swanstrom: We have condemned judges—churches in this district—judges too, sometimes—we have condemned churches in this district, and there is no market value on churches at all.

The Court: It seems to me that this witness may very well testify as to that matter. I think it has been established by the witnesses for the Government that this is unique property. There must be some way of determining the value. It is not only unique from the standpoint of having attached to it the trailer establishment, but it is a unique type of business. The Government's
206 appraisers seem to know nothing about it at all, and I think the jury is entitled to know something about what the gross income might be from such type of operation. Objection overruled and he may answer.

By Mr. Ashenden:

Q. You can answer the question.

A. Taking into consideration the growth that has occurred since 1954 I would estimate that that operation should have grossed, aviation-wise, sales, student instruction and other activities connected with aviation particularly—over a period of something, as you stated that—

Q. Two years and eight months.

A. Two years and eight months, about $2,000,000, probably, for two years and eight months. That is gross income from everything, money taken in, sales made.

Q. This specifically does not include anything other than flight operation, is that right?

A. I am talking about flight and sales, aviation activities.

Q. It does not include trailer facilities or—

207 A. I know nothing of that.

Q. I would like you to assume now that this lease had two years and eight months to run and was subject to a 60-day cancellation clause which could be exercised by the Government only in the event the Navy decided or the Government decided to use this property for purposes of Naval aviation, assuming that. Do you have an opinion what a willing buyer would pay for this lease, for this two years and eight-month period as of October 6, 1954, do you have an opinion, sir?

A. Basically,—

Q. First answer as to whether you have such an opinion.

A. Yes, I have an opinion. It is based on rule thumb. Dealings of such types of business, and aviation business, figures that it can afford to pay a maximum of five per cent of its gross income for the acquisition of properties, I mean the acquisition of the use of properties, inasmuch

as the location and the use of properties are the most valuable things, that it has to do business with, based on that basis, five per cent of $2,000,000 would be $100,000.

I would hesitate to pay that much and it would take
208 a lot of dickering to get me up to that certainly,

but basing it on the rule of thumb that would be the top absolute value.

Q. This would be what a willing buyer would pay, is that right?

A. My opinion is what he would be willing to pay.

Mr. Swanstrom: I object to that as too general and too speculative, your Honor, and I ask the answer be stricken.

The Court: This is the first thing we have had that approached anything about value. It may stand.

By Mr. Ashenden:

Q. Do you have any opinion as to what it would cost a manager to operate this location on a yearly income basis, yearly salary basis, to operate all of the flight phases of this thing that you are talking about, per year, during this period of time?

A. I am sorry, I don't understand that question. The manager's salary—

Q. Yes.

A. Or what it would cost in overhead?

Q. No. What would a manager's salary be for
209 this period to manage these activities?

The Court: You are going in to get quite a bit of detail if you go into that.

Mr. Ashenden: This is for a specific purpose and I will not go any further on this.

By the Witness:

A. In 1954 the manager of one of my departments drew $6,000, and another drew $7,200. Those men will draw $9,800, $10,000, $12,000 today.

Mr. Swanstrom: I object to that as immaterial and ask it be stricken.

The Court: It is not harmful, but I do not yet see how it is helpful.

Mr. Ashenden: We expect to connect that up.

The Court: You will have to connect it up because I do not see how it is helpful at the present time.

By Mr. Ashenden:

Q. In your opinion would you state as an expert in aviation what the likelihood was of the Navy using this field for aviation purposes in October of 1954?

210 A. Very remote.

Q. Why do you say that?

A. Training was largely going to Jets. Piston engines were being replaced as quickly as possible by other types of equipment, and that field, in my opinion, was only suitable for a satellite practice field with SNJ aircraft during the war.

Q. Or stirman's?

A. Stirman, it is a Navy designation for stirman.

Q. In your opinion, Mr. Wilson, what was the most important asset of the Illinois Aircraft Corporation, the people who operated Arlington, in October of 1954?

A. An airport off of which to operate.

Q. Could any other airport operator in your opinion have operated this airport successfully, considering this location?

A. Oh, yes, I think so.

Mr. Ashenden: You may cross examine.

Cross Examination by Mr. Swanstrom.

Q. Mr. Wilson, you stated that it was quite unlikely in your opinion that the Navy would ever want to

211 use this airport. Did you want to say it that way, or use it as it had been first established by the Navy?

A. I don't believe I stated it quite that way, did I?

Q. How did you say it?

A. I said for training purposes.

Q. For training purposes?

A. Yes.

Q. And you did not want to imply in any way that the Navy or the Army or any other branch of the Government might not want to use this land for some other governmental purposes?

Mr. Ashenden: I object to that.

The Witness: Certainly not. I was asked as to my opinion—

The Court: Just a minute.

Mr. Ashenden: I think if the question were specific the witness could answer it, Judge.

The Court: I think he is entitled on cross examination to ask him exactly what he meant.

Objection overruled and the answer may be made.

212 When they make an objection just hold your answer, please. Sometimes it should not be answered, but I did not hear all of your answer, so will you repeat it?

The Witness: I said I did not believe I qualified it as to the other types of uses except in Naval aviation.

By Mr. Swanstrom:

Q. And by Naval aviation do you mean a training program?

A. I meant a flight operation.

Q. Just flight?

A. Flying operation.

Q. If the lease under which this airport was being occupied, introduced in evidence here as Plaintiff's Exhibit 1, provided as follows:

"It is understood and agreed that this lease will at all times be revocable at will by the Government upon presentation of notice of cancellation to the Lessee, in writing, sixty (60) days prior to such termination, in the event of default with regard to the covenants and conditions of the lease or in event of a
213 national emergency and a decision by the Secretary of the Navy that such revocation is essential,"—

if that is the only provision in the lease relating to cancellation, would you still say that it was highly improbable that the Navy would ever cancel this lease?

A. I would say that it would be highly improbable that they would. I don't see any reason why they should.

Q. You don't. You have never been Secretary of the Army or of the Navy?

Mr. Ashenden: I object, if the court please.

The Court: Objection sustained.

Mr. Swanstrom: I am going into his qualifications.

The Court: Just a second. Let us treat the witness with respect. He has not said anything here that would lead us to believe that he professed to hold any official positions, and let us not cast any—

Mr. Swanstrom: I was not intending to—

The Court: I know, but the witness never stated
214 he had been Secretary of the Navy.

Mr. Swanstrom: I just want to explain a little the testimony by that kind of a question. In other words, I might say something about the Government with absolutely no knowledge—

The Court: Ask him if he has ever held any official position.

Mr. Swanstrom: Very well.

Q. That GI bill of rights took on in 1955—not the bill of rights, but the GI bill, that gave the returning soldiers tuition fees to study flying, you said took on in 1955?

A. No. That was only the Korean portion of it.

Q. The Korean portion of it. When did the other stop?

A. The other did not stop until the students were terminated as late as—some of them as late as 1956.

Q. I see. When you testified to $2,000,000 gross income in 1954, for two years and eight months, as the estimate of the gross income at this field, you did not have any real knowledge of the expenses to run that field, did you?

215 A. None at all. After all, the gross income is $2,000,000 taken in.

Q. I see. And of course you had no knowledge as to whether the same personnel would be continued there or not?

A. None whatsoever.

Q. If it could be projected, that would be it?

A. (No response.)

Q. When you say that the fictional purchaser in the marketplace would be interested in paying, I think you said, $100,000 on this—

A. I based that on an estimate.

Q. Yes, it is your opinion, it is perfectly all right. Did you take into consideration any factions such as the possibility of a lawsuit, whether right or not, to terminate the use of any of the facilities in this port, the cancellation notice that I just read you, did you take any of that into consideration?

A. I have not read the lease. I don't know any of the terms of the lease.

Q. Then let us say you did not take that into consideration.

A. I do not know—

216 Q. You considered the fictional buyer or prospect down there in the marketplace, the only fellow we

have to deal with is the fellow who might buy the thing —a two year and eight-month lease at this location of some 94 acres and the facilities they had, and the growth of the business of flying and all that thing, that is all you considered?

A. You could consider it had been in existence for seven-odd years before.

Q. Yes, and its history that it had achieved a certain amount of, shall we say, good will, at least it has been there, those are the only elements you took into consideration, is that right?

A. Basically, yes.

Mr. Swanstrom: That is all.

The Court: All right.

Mr. Ashenden: I have one more question, if the court please.

The Court: All right.

Redirect Examination by Mr. Ashenden.

Q. Your opinion was based on the assumption I gave you as to the Naval aviation being the only basis for
217 the Government taking, isn't that true?

A. That is correct.

Mr. Ashenden: All right, fine. I just wanted to clear that up. Thank you very much.

Mr. Swanstrom: I have one more question.

The Court: All right, one more. We judges and lawyers don't know when to stop talking.

Mr. Swanstrom: I had it noted, but my memory is not so good and I had to be reminded of it.

Recross Examination by Mr. Swanstrom.

Q. You have a license to run your airfield, haven't you?

A. We are not licensed. We are granted a certificate by the State of Illinois as an airport.

Q. I see. Do you know whether or not this Illinois Aircraft Sales and Services Company had such a permit?

A. I do not know of my own knowledge.

Mr. Swanstrom: That is all.

218 Mr. Ashenden: Thank you, Mr. Wilson.

The Court: All right, witness excused.

(Witness excused.)

(A recess was taken until 2:10 o'clock p.m. of the same day, April 10, 1957.)

219 * * (Caption—No. 54 C 1468) * *

Before Judge Perry,
and a jury,

April 10, 1957,
2:10 o'clock p.m.

Trial resumed pursuant to recess.

Present:

Same as before.

The Court: Call your next witness.

Mr. Ashenden: Prior to doing that, if the court please, we would like to offer in evidence now Defendants' Exhibits 1, 2-A, 2-B and 2-C.

Mr. Swanstrom: I object to the introduction of these documents as evidence for the reason that no foundation has been laid for them, they are absolutely immaterial to the issues here, they are merely correspondence from one Government agent to another and there is no
220 possible materiality they can have to the issues here. I object to them.

The Court: There is no objection as to the authenticity and the genuineness of the letters, is there?

Mr. Swanstrom: I cannot do that for the reason that these were taken from the files of the Government.

The Court: That is what I mean. You furnished them, so that as to the genuineness of the documents you make no objection and you do not make an objection that he has not obtained them by proceeding through Congress and receiving exemplified copies and all of that, you do not make that objection; you are objecting as to materiality. Is that right?

Mr. Swanstrom: That is right.

The Court: Are there any other comments concerning those instruments?

Mr. Ashenden: Yes, if the court please. These instruments purport to show the disposition, as far as the Navy was concerned, of this particular airfield. They are very pertinent, in the first place, because they directly concern the field in question. They are also pertinent because
221 they show conclusively that the Navy had the disposition to declare this property as surplus property, just exactly what the Navy intended to do with the property prior to the condemnation.

Mr. Swanstrom: I agree that these documents evidence such an intent at that particular time by that particular office. But I do not see the materiality of it. If there is any mystery about the thing I would rather have them go in, but I do not like mysteries.

The Court: I don't think there is any mystery in it.

Mr. Swanstrom: They are not conclusive on the Navy or on the Government.

Mr. Ashenden: We do not pretend that they are conclusive. We say they tend to show the remoteness of a certain possibility, in our theory of the case.

The Court: I think they may be admitted for the purpose of supporting your contentions in that respect. They may be admitted.

Mr. Ashenden: And may I then read them to the jury, if the court please?

The Court: They may be read to the jury. Anything that is admitted can be read.

222 Every once in a while you hear me cautioning someone about reading something that has not been qualified. But after it is qualified anything can be read.

Mr. Swanstrom: Just one moment. I think the court ought to instruct the jury that this is not authoritative on the question, or decisive on the question of whether the Navy or the Government or any branch of the Government—what they may or may not do with reference to this property the day after these letters were written or what they may have done the day before the letters were written.

The Court: I will grant you there is no doubt but what the Navy might reverse its position and exercise its rights the very next day after the letter was written, as far as that is concerned. But I think counsel has a right to show what the disposition was.

I think there is no secret about it, that if this property had been taken for an airfield we would not be here, but it was taken for some other purpose. That is the issue.

Mr. Ashenden: Does counsel have any objection if I delete parts of these letters—

Mr. Swanstrom: Oh, just read the substance of 223 the exhibits, and who signed them and to whom they are addressed.

Mr. Ashenden: Very well.

(Said exhibits, so offered and received in evidence, were respectively marked Defendants' Exhibits 1, 2-A, 2-B and 2-C, and were read from to the jury by Mr. Ashenden.)

Mr. Swanstrom: I have to renew my objection, your Honor, on materiality. The lease between these parties is the fundamental document, the thing that they are bound by. This lease provides by paragraph 1 that it may be revoked by the Government under the provisions of the lease, and in paragraph 14 it provides, and I will read it again because I have read it so often, that the Government may revoke this lease upon sixty days notice; paragraph 15 says that all disputes concerning questions of fact arising under the lease are to be decided by the Secretary of the Navy or his duly authorized representative, whose decision shall be final and conclusive upon the respective parties.

What materiality can there be to these letters?

224 Mr. Ashenden: May I again state that I believe this is a legal point which, if argued at all, should be argued before the court, and—

Mr. Swanstrom: You have introduced them before the jury, and I am making objection as to their materiality.

Mr. Ashenden: Your argument went to—

Mr. Swanstrom: My argument goes to the fact that they are immaterial because of the contract between your client and the Government.

Mr. Ashenden: In your interpretation of it, sir.

Mr. Swanstrom: No. I did not interpret it. I read verbatim from your contract.

The Court: Gentlemen, the Government put on witnesses who looked at the lease and other factors, and they made an interpretation and an evaluation and took

those things into consideration when they testified, and I do not see how I can deprive the defendants of the right of showing the facts were different from what the witnesses for the Government testified to.

Mr. Swanstrom: Your Honor, I have made my objection and you have ruled against it.

The Court: I think it is only fair that the jury understand the whole situation here. Objection
225 overruled, and the evidence is and has been admitted, and the motion to strike it is denied.

Mr. Ashenden: Thank you, your Honor.

Mr. Rogers, would you take the stand, please.

The Court: To the jury, this question of the likelihood of it being cancelled is an important matter, and each side is entitled to put on whatever evidence it has. We are dealing here with a case where a lease was entered into and thousands of dollars were spent, and now we have the question of what the value of it is, and I have to let both sides put in their full evidence.

WALTER ROGERS, called as a witness herein on behalf of defendants, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Ashenden.

Q. Will you state your name, please?

A. Walter Rogers.

Q. Where do you live?

A. 779 Wolf Road, Desplaines, Illinois.

Q. What connection have you with the Illinois
226 Sales and Service Corporation, the defendant in this case?

A. Well, I have been a vice-president and a principal stockholder in the corporation.

Q. And were you director also of the corporation?

A. Also director.

Q. You were one of the principal stockholders, am I correct in that?

A. Right.

Q. In what year did you first become connected with this company?

A. Oh, I would say about the spring of 1946.

Q. I want to get into your background in the field of aviation, Mr. Rogers. When did you first become interested in aviation?

A. Well, about 1938 when I became interested in flying.

Q. What happened in 1938?

A. Well, in fact about 1938 I became interested in flying and had taken my training at Ravenswood Flying Service at Desplaines, Illinois, which I then lived in.

Q. Did you do that in company with anyone else?

A. Yes. I met Mr. Morris Fishman who was 227 my partner.

Q. And did he also become ultimately active in this corporation?

A. That is right.

Q. Prior to and during the time in 1938, what occupation did you have at that time?

A. Well, in 1938 I have been with the International Harvester.

Q. What kind of work did you do for them?

A. Well, I was selling heavy duty road equipment and of course construction equipment.

Q. And after you were with the Harvester Company what other type of work did you do outside of flying?

A. Well, we became engaged in flying at Ravenswood Airport and continued—

Q. I don't think you understood my question. Outside of flying, after you worked for Harvester, where did you work?

A. Oh, I see. After I left International Harvester I have worked for the Buick Aviation Engine plant during the war days.

Q. Where was that?

A. In Melrose Park.

228 Q. What was your title?

A. I was production superintendent on aircraft engines.

Q. How long were you with the Buick defense plant?

A. Well, it was during the war days, about 1942 through 1945.

Q. What happened over at Ravenswood Airport after you had been taking flying lessons from 1938?

A. Well, we continued flying there, and more or less—

Q. And when you say we whom do you mean?

A. Morrie and myself, who had been my associate up to now, continued flying there up until about—from 1938 to about 1942, the early part of 1943, when we had—

Q. What did you do then?

A. Taking over the flying service.

Q. And you and Mr. Fishman then operated this flying service?

A. That is right.

Q. How long a period of time then from 1942 did you operate this flying service at Ravenswood Airport?

229 A. Through 1942 to 1947.

Q. You did not own the airfield itself, did you?

A. No. We leased the land, the ground, the property.

Q. What was the size of the flight operation at the Ravenswood Airport, if you remember, over the period of time that you operated it?

A. The size of the operation or the field?

Q. No, the size of the operation with respect to—how many students did you carry, for example, during that period?

A. It varied. It started off with I think, I would say roughly, about three airplanes actually two in operation and one damaged airplane, with about twenty students, and continued—

Q. How many did you carry during the period of years that you operated there?

A. Well, I will say they carried up to 125, 150 students, through 1947.

Q. In 1947 you stated previously that you became interested in the Illinois Aircraft Company, this defendant, in 1946, is that right?

A. Yes.

Q. And did you sell your interest or—excuse me. What did you do with your interest in Ravenswood, or what did you do with this Ravenswood operation in 1946 or 1947?

A. Well, in 1946 we became interested in negotiating a lease deal with the Navy on Arlington Airport.

Q. When you say we, who was interested at that time?

A. Well, I mean Illinois Aircraft Corporation, which consisted of Morris Fishman, Leonard Hartenfeld and our associates.

Q. All right. Was there a lease that was subquently executed then with the Navy on that?

A. Yes.

Q. What did you do as far as Ravenswood was concerned then, sir?

A. Well, we sold our flying operation at Ravenswood and had moved into the Arlington Airport.

Q. Why did you change from Ravenswood to Arlington?

A. Well, the tremendous faciliities, for one thing, its location—

Q. What was the location of Ravenswood and the size of Ravenswood and the facilities?

A. Well, Ravenswood Airport, if I remember right, consisted of about 26 acres, with just small hangar 231 on, a hangar of about six airplanes, whereas in Arlington we had just about four times the size of land, and more so, more modern heated large hangar which—

Q. How much bigger was the hangar at Arlington than at Ravenswood?

A. I judge we could hangar around 20 or 25 airplanes at Arlington Airport, a large heated hangar.

Q. I want you to describe the facilities there when you took over in 1947, as best you can. Let us start with the hangar. What condition was it in, what did it consist of, as best you can describe it now?

A. It was in very nice condition, good condition, excellent condition, I would say.

Q. Can you relate it to the condition that it is in today, or the other day when you were out there with the jury and viewed the premises. Was it substantially in the same condition?

A. The same, except for a few modifications like, I would say the lighting system has been changed some, and a few added partitions have been added or removed or changed.

Q. The partitions on the second floor where the
232 offices are, were they in the same condition or were they of a different arrangement?

A. Somewhat modified since we had it.

Q. Actually what did you have in the second floor operation that is a part of your business operation at the field there?

A. We have conducted our ground schools on engines and aircraft, and also on navigation, meteorology, and we also had our club room for the Civil Air Patrol.

Q. What is the Civil Air Patrol?

A. That is a civilian flying school that is formed—supervised by the Government. There is no salary involved in it, it is all voluntary.

Q. Were there any other agencies that used your facilities up there?

A. Yes. The Civil Aeronautics meets there occasionally.

Q. The Civil Aeronautics?

A. Yes.

Q. What would they do there?

A. They would call flight meetings, call flight instructors and probably tutor them on current modifications or flight test and probably regulations being intro-
233 duced, kept us up to current information or whatever changes are being made in flight regulations.

Q. And they used these facilities at the airport that you are leasing?

A. That is right.

Q. We noticed that there were some concrete ramps outside of the hangar facility when we were out there the other day. Were they there at the time?

A. Yes.

Q. What use, if you can describe, were they put to,

or what particular value did they have in connection with this operation?

A. They had excellent value, to the point where you could remove the airplanes out of the hangar very easily in all weather conditions, and taxi up to your service for gasoline, ramp, and maneuver it completely on the solid pavement, which made it very easy.

Q. How big, if you can recall, was this area?

A. There were two ramps, on the east and the west end of the hangar. I would say they consist of probably about 50 feet of width, about 125 feet in length.

234 Q. How many planes could be parked at one time on the ramps, if you remember?

A. Well, it all depends on how they would be parked or lined up. I would say roughly on both ramps or—

Q. Yes.

A. Oh, anywhere from 15 to 18, 20 airplanes.

Q. All right.

A. Depending on the type, size, high wing, low wing, or—

Q. Are you familiar, Mr. Rogers, with other private flying installations in the Chicago area?

A. Yes.

Q. Were you familiar with such installations in 1954?

A. Yes, I have.

Q. Do you know of any other installation in the Chicago area that had the hangar facility and the concrete ramp facility that Arlington Field had?

A. No, I don't.

Q. Do you know of any other facility, private facility, that had the hangar alone, comparable hangar alone?

A. Well, there are a couple of airports that may 235 have been comparable, but nothing like it.

Q. Were there any that had any better than this?

A. I wouldn't say better. Not as good probably, close to.

Q. In addition, in the hangar, to the facilities you have talked about, there were also some showers, weren't there?

A. That is right. Showers, and of course in our club rooms—

Q. And were there locker room there too?

A. And showers.

Q. What particular asset were these in your operation?

A. Well, they would have quite an asset. The fact that we were able to utilize them almost as a living quarter, for the fact of the convenience, such as taking your shower and continuing on in the operation throughout the whole day without leaving the premises.

Q. Were the flight students permitted to use those facilities too?

A. Flight students also, cadets, probably could change their uniforms into civilian cothes, and had the facil-
236 ities on the premises without leaving the premises.

Q. All right. This control tower on the third floor of this hangar facility, there is this little octagonal-shaped area, I think it is called control tower, is that right?

A. That is right.

Q. Was that there when you were there in 1947?

A. Yes.

Q. What particular use did this have in your airport operation?

A. Well, the big asset in night flying, we would utilize it for night flying, night operation.

Q. You can control your night flying from there?

A. Yes.

Q. From that facility?

A. Yes.

Q. Were there any shop facilities in the hangar?

A. Yes. On the west wing of the hangar there is a partition for a shop.

Q. What kind of a shop was this, Mr. Rogers?

A. To maintain the aircraft and aircraft engines.

Q. How big would you say that was?

A. Oh, in size—we could manage, depending on the aircraft, from five to eight aircraft, five to eight
237 airplanes at one time.

Q. Inside?

A. Inside the shop, yes.

Q. For shop maintenance purposes, is that right?

A. That is right.

Q. Did you have to do anything to the hangar facility to make it usable for your purposes when you went into the operation there in 1947?

A. No, no great modification, probably just a few shelves or stock bins that had been added.

Q. That is about all?

A. That is about all.

Q. And when you left the hangar after condemnation in 1954, did you leave it in the same condiiton?

A. Yes.

Q. Let us turn to the field, the flying field itself. What type of field was this Mr. Rogers?

A. Well, it was a sod field, a grass field.

Q. Did it have any particular advantages over any of these other airports, private airports, that you have said you have been acquainted with?

A. Well, we think so. In fact, my personal opinion, and we noticed the fact that it had no obstructions to
238 flying out of the airport. It has been a clear field, an all weather field to the point that it has been

drained well and we can land in any direction.

Q. Do you know whether there was any drain tiles under that sod?

A. I assume there was, it drained off very nicely after heavy rains.

Q. You could fly it in all weather?

A. Yes. Well, we might have got bogged down in heavy snowstorms, but due to rain conditions or slush, we didn't have to bother with it, heavy snowstorms restricted our operation for a time.

Q. All right.

What about the general location of the airport and the field with respect to flying? Was there any particular asset as to that?

A. Yes. It is located very well. In fact, it is located just about I would say in the heart of the metropolitan area, what we consider one of the finest and closest points to the metropolitan area.

Q. What about with respect to other large commercial or military airfields? I have in mind O'Hare and Glenview particularly.

A. We are completely out of their control zone, 239 no hazard or no interference.

Q. Well, are all the other private airports that you are familiar with out of that control zone?

A. Ravenswood is in the controlled area of O'Hare right now. It is considered to be in the jurisdiction of the O'Hare Airfield.

Q. For that purpose?

A. For that purpose, being that it is—

Q. With particular reference now to beginning flying students, of what importance is the fact that you are not within a control pattern of one of these larger installations?

A. It plays a great importance in the fact that it

takes all the hazards out of aircraft collisions in mid-air and—

Q. Both to the commercial or military installation and to these individuals?

A. That is right. It makes the student more relaxed and of course gives him just that much advantage in picking up his instructions and knowledge in flying.

Q. You were out there, as I say, the other day when we visited the location. What did you see there, Mr. Rogers, now that was not there at the time that you
240 vacated?

Mr. Swanstrom: Is that of consequence, your Honor?

The Court: Objection sustained. That would be something that happened since it was taken over.

By Mr. Ashenden:

Q. Let us now go to the barracks, the barracks facilities. What did you do with those barracks, that H-shaped barracks building, when you went in there in 1947 or immediately thereafter?

A. Why, we had partitioned the building in dormitory style, which has been restored to the same condition, to apartments.

The Court: We will take a short recess.

The witness may leave the stand but will not discuss his testimony with anyone.

(A short recess was taken.)

By Mr. Ashenden:

Q. I think our last question had to do with what your company did with the barracks building when you got there in 1947. Will you answer the question again, what actually did you do to it?

241 Q. In the barracks building we had partitioned large open rooms, dormitory rooms, into kitchenette apartments, one or two-room apartments.

Q. All right. How many apartments, how many individual apartments were constructed in that fashion?

A. I would say approximately around 32.

Q. And what were the sizes of those apartments, as far as rooms were concerned?

A. Well, they varied. They were single room kitchenette apartments, two-room apartments, partitioned off into different sizes.

Q. What improvements or facilities did you put in each apartment?

A. Why, they were equipped with utilities such as full-sized sink, refrigerator, gas range or electric range, which were more suitable in the location of the apartment.

Q. And did you put any of the utility connections in?

A. Well, the utilities had to be revised, and also our complete plumbing system had to be revised, modified for the suitable drainage.

Q. And I believe there were also kitchen cabinets 242 in the kitchen, is that right?

A. Yes, like most apartments have.

Q. I think there was a portion of the barracks building that we did not view when we were out there the other day. Was there a basement in any portion of this building?

A. Yes. Basement was located on the northwest wing of the building.

Q. In other words, if you would picture one of the H's, it was at the top extending portion of one of the H's, is that right?

A. Yes.

Q. And the basement was under that area, is that correct?

A. That is right.

Q. What, if anything, did you do with the space in the basement?

A. Well, the basement was utilized for storage room and also a laundry room. It had automatic washing machines, dryers, clotheslines,—

Q. And for what purpose did you have the laundry machines in there, the washing machines? For whose use, I should say.

A. For the tenants' use that occupied the building.

243 Q. In addition to the laundry and to the apartments that were created in this barracks building, was there any other type of activity that went on in the building itself?

A. Yes. We had a lunchroom there and a grocery store.

Q. You, however, did not take any income from that type of thing, did you?

A. Well, I will say that it extended—we did not operate a concession. It was leased out as a tenant.

Q. And the tenant operated it on his own, is that right?

A. That is right. We had nothing to do with the operations.

Q. Can you think of any other activity that went on during the course of your lease that you were there for the seven and a half years that you operated there, can you think of any other activities than those you have mentioned with respect to the barracks building?

A. Well, we had a schoolroom there, for the children who lived on the premises.

Q. Where was that?

244 A. That was located in the barracks building on the first floor.

Q. What part of the first floor, Mr. Rogers?

A. Located on the southeast end.

Q. On another one of these H's or was it in the middle of the H, or one of the corners of the H?

A. Well, I would say it favored probably the H and it was past the center point, I would say.

Q. You would say that it was in what would be the middle bar of the H?

A. That is right.

Q. On the first floor?

A. First floor facing south, southeast.

Q. What had to be done in connection with the construction of the schoolroom?

A. Well, we had to modify the apartments, in fact, removed it completely and—

Q. You had made apartments in there at one time is that right?

A. That is right.

Q. And then you removed the apartments, is that correct?

A. Yes. Removed the partitions.

Q. Go ahead. What had to be done to make the 245 schoolroom?

A. It was quite an extensive modification due to the fact that our separations of apartments were part of the supporting structure of the upper floor, so we had to have an engineer on this modification to allow for the stresses and the type of stress and size, and carry the load of the second floor.

Q. Was anything done with respect to notifying the Navy, or did the Navy know about this modification of the building?

A. Yes, the Navy was notified through a print and the type of modification, stresses and materials we were going to need.

Q. Do you know of your own knowledge whether the Navy approved or disapproved of this modification?

A. Well, it has been approved or else we would not proceed with the modification, approved by the Navy.

Q. Who conducted this school?

A. The school was conducted by the Elk Grove Township school board, and they furnished the teachers and all the supplies, and we of course furnished the premises and the utility facility.

246 Q. And this service was furnished to the children of the families who were living in the barracks building and in the trailer area, is that correct?

A. Yes.

Q. Do you remember offhand how many children were there on the premises?

A. On the premises or in the school?

Q. Let us say in the school.

A. Well, I will say it exceeded probably a hundred children, anywhere from 90 to a hundred, somewhere in that bracket, probably 105.

The Court: Mr. Witness, was your answer with respect to this particular improvement that the Navy Department had approved, did that apply to all changed, alterations and improvements that were made by you? Was that submitted to the Navy Department and did they approve each and every alteration, or was that for some special instance?

The Witness: Your Honor, all modifications due to—

The Court: In the building, and so on.

The Witness: That is right.

The Court: That is, you first submitted it to them
247 and obtained their approval before you proceeded, is that correct?

The Witness: That is correct, your Honor.

The Court: I just want to know whether it was limited to that one instance or whether you did that in every instance.

The Witness: If I may say, your Honor, a small modification like hanging up a shelf or probably switching over—

The Court: That would not be an alteration. That would be just a little addition or something like that.

Any substantial alteration or modification, you obtained permission from the Navy, and their approval, is that it?

The Witness: That is right.

The Court: That is, of the landlord, the owner of the premises?

The Witness: Yes.

The Court: I just wanted that clear.

By Mr. Ashenden:

Q. As a matter of fact, the Navy inspected this place, did they not?

248 A. Yes.

Q. Were there regular inspections by the Navy?

A. Yes, there were periodic inspections.

Q. And would they go through the entire premises?

A. Correct.

Q. And this went on during the entire seven and a half years that you were in there, is that correct?

A. That is correct.

Q. With respect now to the barracks building, did you bring in water lines and electrical lines too in connection with these individual apartments you had constructed?

A. I wouldn't say we had—we had water, electrical lines, in the building, buf they had somewhat to be changed and modified for location purposes.

Q. That is what I meant. They were brought in and made adaptable to each apartment, is that right?

A. That is right. They were revised, I would say.

Q. Was there any approval that was needed for this type of wiring and this type of water main or water
249 lines that were brought in? Was there any approved practice that was used?

A. Well, the work had been done by approved electricians and by approved plumbers. I don't quite follow you, but—

Q. I think you have answered my question.

The Court: Was that approved also by the Navy, were those modifications and those charges also approved by the Navy?

The Witness: I do not believe the Navy made an inspection once the installation was made. I can't say.

By Mr. Ashenden:

Q. Well, they saw the entire change that you made?

A. They saw the entire change, but I don't know if there was any comment on it. I don't know if I ever heard anything on it.

Q. Can you give me any idea as to how much was spent by the corporation in improving the barracks, or modifying the barracks that you have just described?

Mr. Swanstrom: I object to that. There is no foundation for his giving any figure on that. I don't know whether he knows.

250 Mr. Ashenden: I will qualify him on that.

The Court: Objection sustained at the present time. I think you are correct, Mr. Swanstrom. I think we should have some better foundation.

By Mr. Ashenden:

Q. Did you have personal knowledge on who supervised this installation that you described?

A. It was part of my supervision. Of course, I had associates that would take over—

Q. Were you on the job at all times when this was being done?

A. Not at all times, no.

Q. Well, how much of the time?

A. Probably I would say I spent one-third of my time. Of course, I was engaged in flying and—

Q. Did you know of your own knowledge how much was spent on this installation?

A. How much in dollars and cents?

Q. That is right.

A. I have a recollection of our records. It exceeded somewhere around—it exceeded $25,000, $25,000 to $30,000, in that bracket.

251 Q. On the barracks?

A. On the barracks building.

Q. Let us then go to the trailer park facility. When you took occupancy under the terms of your lease was there any type of facility for trailers at that time?

A. No. Just sod land.

Q. What did you do with respect to the trailers?

A. In improving the land or bringing in utilities and facilities?

Q. Yes, just describe what you did to make trailer sites.

A. Well, we had to extend our sewer and water lines to each trailer site.

Q. What type of equipment went in for those purposes?

A. Glazed tiles, six-inch drainage tiles, sewer tile for the sewer system, and one and one-half inch water line with anti-freeze valves and overhead utilities, power lines, which supplied the electricity.

Q. In addition to that, was there any other type of

structure erected in connection with the trailer operation?

252 A. Yes. There was a shower house erected on the southeast corner of the trailer park, not of the property.

Q. It was on the property, was it?

A. It was on the property, yes, located on the southeast corner. It was a concrete building, consisted of shower stalls and—

Q. A one story building?

A. One story building, that is right.

Q. How big was it approximately?

A. I would say it run in size about 40 by 50.

Q. What was in there in the way of facilities?

A. It had all the sanitation, utilities, and included showers and locker rooms, and—

Q. Toilets?

A. Toilets and sinks and—

Q. Where was this building? Was this building out there the other day when we visited the premises?

A. No. That was disposed of.

Q. And where was it located with reference to anything that was on the property that we saw?

A. Well, I believe it was located—

Mr. Swanson: You can use the exhibit here.

253 The Witness: Yes, it is an exhibit here.

By Mr. Ashenden:

Q. All right.

A. It has been located I believe just about where we had—

Q. I show you Plaintiff's Exhibit 3 for identification, and ask you to point out this structure that you are now referring to. Is this it?

A. Yes, right there. That is it right there.

Mr. Swanstrom: Counsel, mark it with a red something.

Mr. Ashenden: If I had a pen I would do it.

Mr. Swanstrom: Red ink, or something.

Mr. Ashenden: I have circled the thing.

Mr. Swanstrom: Counsel, does the record show how you marked it?

Mr. Ashenden: Let the record show I encircled the structure in question on Plaintiff's Exhibit 3 in ink.

While the jury is looking at this we can go to another subject now.

Q. What did you do with reference to the installation and construction of the trailer site and this building 254 you have just discussed, personally?

A. What did I do?

Q. Yes.

A. I supervised it in many cases, ordered materials, and—

Q. All right. Do you have any personal knowledge, any idea of how much was spent on that phase of the improvement?

A. As a trailer park alone and its improvements—

Q. Trailer park, I mean the bringing in of the utilities, the establishment of trailer sites and the building of this building and its improvements, how much was spent for that?

A. I would say our records will show in excess of $30,000, roughly speaking. It may exceed that.

Q. Let us go to the flying operations there. When you came into your lease and started to occupy the premises was there any type of flying at all going on there?

A. No, there was no activity at all when we first moved in.

Q. How many planes did you have when you first came in there?

A. We started in operation with about six to eight 255 airplanes at the time.

Q. What is the maximum number of planes that you had during your operation?

A. We operated approximately 26 airplanes.

Q. What kind of planes were they?

A. They varied. They varied, I would say a highway monoplane, all metal, Stinson's, highway mounted plane, PT-19, the Army had used previously for primary training; we also had Stirman's biplanes used by the Army and the Navy both for primary training. They varied from time to time.

Q. Were these two-and-four passenger planes?

A. Yes.

Q. With respect to students and the flight instruction that went on during the course of your operation, how many students did you have in 1947 in the beginning?

A. Oh, I would say we probably started off with about twenty, twenty-five students.

Q. And what was the maximum number of students you had during the course of your lease?

A. I remember an enrollment up to 300, up to 300. It wouldn't hesitate to exceed 300.

Q. When would you say, if ever, this operation 256 got to a point where it was operating or functioning smoothly, shall we say, what time, what year in point of time?

A. Functioning in what manner?

Q. Smoothly, the operation, the flight operation, the trailer and the barrack facility.

A. Back in about 1953 we had it organized to the point where it was going real smoothly.

Q. Pardon me, you had it organized—

A. Had it organized where it was to the point where it was going real smoothly.

The Court: I think the jury is entitled to know when these improvements were made. I think you should ask the witness as to the time.

Mr. Ashenden: I am sorry, Judge. I meant to do that.

Q. When did you do these things as far as the trailer facilities and the barracks improvements, in what year were they done?

A. Oh, my best memory is the early part or the spring of 1948.

Q. In other words, within a year of about the time you took over the premises, is that right?

257 A. I would say approximately yes, it was in a year.

Q. Well, let me ask you this then. From the time that you constructed these barracks apartments and also the trailer sites, what was the fact with respect to the occupancy of both, from that time until the time the property was condemned?

A. Very good.

Q. Well, what else can you say about it with respect to occupancy?

A. Oh, I would say we were running 100 per cent occupancy, plus a waiting list, and—

Q. At that time, as a matter of fact, there was a housing shortage?

A. Housing shortage and of course there was a housing shortage throughout. not only apartments but trailer sites also.

Q. You said in 1953. Would that be the early part of 1953 that the thing was operating smoothly?

A. Yes, about the spring of 1953.

Q. All right. You actually had other activities for the Illinois Aircraft Corporation that you undertook during that time, is that right?

A. Right.

258 Q. What would you say, Mr. Rogers, was the most valuable asset of the Illinois Aircraft Corporation?

A. Well, there is no doubt in my mind, its location was very important, its location and its facilities. There is none like it.

Q. When the property was condemned, when this lease was condemned on October 6, 1954, what did the company do?

A. We just went out of business.

Mr. Swanstrom: I must object to that, your Honor.

The Court: Objection sustained.

Mr. Swanstrom: There was never any condemnation of the lease in this case.

The Court: Objection sustained.

By Mr. Ashenden:

Q. After October 6, 1954, did you have occasion to look for other usable property in the entire Chicago vicinity for this same purpose?

Mr. Swanstrom: I object to that, your Honor. Under the authorities—

The Court: Read the question.

259 (The last question was read by the reporter.)

The Court: I think counsel is right on that. I am allowing you to prove what happened here, but as to what he might have done somewhere else, and so on, I think—

Mr. Ashenden: This only goes to the question of the uniqueness of the property and the availability of similar facilities.

Mr. Swanstrom: That is not admissible, under the authorities.

Mr. Ashenden: I think it has been previously ruled that it is.

Mr. Swanstrom: Well, the Supreme Court does not say so under the Miller case.

Mr. Ashenden: That is my only purpose in bringing this out, to show uniqueness.

The Court: For the purpose of showing uniqueness of the property?

Mr. Ashenden: That is all. I can limit the question and revise it in a different fashion.

Q. Not putting it in point of time now, Mr. Rogers, after October 6, 1954, but in your experience do you 260 know or did you know, prior to 1954, or any time, any available sites such as this with the equivalent facilities in the Chicagoland area?

A. There isn't any.

Mr. Ashenden: You may cross examine.

Cross Examination by Mr. Swanstrom.

Q. This structure that you indicated with a pen on that picture, Plaintiff's Exhibit 3, you did not remove that when you vacated the premises?

A. No, sir.

Q. How many employees did your company have in 1954, any time during 1954?

A. Taking in the complete operation, flying, maintaining aircraft and—

Q. Employees that were there all the time.

A. On the payroll, all the employees?

Q. Not on the payroll. On the premises.

A. I would like you to clarify the question: What it takes in the complete operation, all the employees on our payroll?

Q. You had maintenance?

261 A. Yes.

Q. You had some instructors possibly?

A. Yes.

Q. You had some repair people?

A. That is right.

Q. And they were on the payroll and they were there working eight hours a day?

A. That is right.

Q. How many?

A. Oh, I would say approximately ten.

Q. You probably had a few more. I don't want to restrict you, you know. You probably had a few more occasionally, instructors, and so forth?

A. It is a possibility. It varies up and down.

Q. Ten to twenty, probably?

A. It would not exceed that, no. It will have, I say, exceeded ten by one or two.

Q. You say the Navy made periodic inspections of the whole operation?

A. Yes, sir.

Q. Did they ever make any complaint to you about the sanitary condition surrounding the operation of the trailer camp?

A. I would not say it was put in the way of a

262 complaint. They would have made suggestions on—well, for instance, this requires painting, this door requires fixing, and—

Q. No, no. I am talking about sanitation and not beautification. Sanitation, the way you handled the sewage, the—

A. Around the trailer camp?

Q. Yes.

A. No, sir.

Q. They did not?

A. No, sir, not on the trailer camp.

Q. It never came to your attention that anybody else ever made any complaints, Cook County Sanitary Commission or—

A. No, sir.

Q. It would not come to your attention?

A. No, sir.

Q. You probably were flying?

A. Yes, I was supervisor there as well as manager, and so forth. I acted in that capacity.

Q. It did not come to your attention anyway. I think you said—did I understand you to say that your greatest enrollment at any one time of pupils learning to fly
263 was 300, or was that an enrollment over a period of time?

A. I will say registered students, active students, no, not at one time, active students, say, as of, we will say, take a certain time, such and such time, we had 300. They varied, but I will say our top was around 300, probably 350, 325. They do vary.

Q. Do you mean registration that would be coming there—they would all come there some time during, we will say, a period of a month?

A. That is right.

Q. And they would go up to 300 as a maximum?

A. That is right.

Q. I understand you now. Did I understand you to say you had a tenant out there? I don't mean in the trailer, but you had a tenant that had charge of part of the operation?

Mr. Ashenden: The restaurant, the store.

Mr. Swanstrom: Oh, the store was run by a tenant?

The Witness: Well, the tenant lived there and also operated a store, yes.

By Mr. Swanstrom:

Q. And was he a tenant where you gave him a
264 certain contract or a lease, or anything like that?

A. No. I don't think we had a lease. It was just a mutual agreement.

Q. He didn't pay anything then?

A. Oh, yes.

Q. Oh, he paid you rent?

A. Yes.

Q. Di,d the Navy approve that?

A. I don't know, I don't know. I don't know that it ever came up.

Q. You said that you had been with this defendant company from 1946 and Mr. Hartenfeld also, and then you said "and associates." Were the associates too many for you to mention?

Mr. Ashenden: I object, if the court please.

Mr. Swanstrom: Counsel asked him who was with him in this venture, and I am asking if they were too many for him to say.

Mr. Ashenden: There is no secret about it if you want to know.

The Court: He may answer the question.

Mr. Swanstrom: If they are too many I would
265 not ask him.

Q. Are they many or are they few?

A. No, there isn't very many of them.

Q. Well, how many, who were they?

A. Morris Fishman, Leonard Hartenfeld, Irv Richman.

Q. What is his last name?

A. Irv Richman.

Q. Richman?

A. Yes. And I myself, Mantynband.

Q. What is his name?

A. Lou Mantynband.

Q. Is he a lawyer?

A. That is right.

Q. As I understood you, you put some partitions—did you have people living in the barracks building too?

A. People living in the barracks building?

Q. Did you have people living there?

A. Oh, yes.

Q. And that is what you put up the partitions for?

A. Yes.

Q. What was the nature of these partitions, what 266 were they made of?

A. Plasterboard, wallboard, whatever you call it. Plasterboard.

Q. There were not any partitions just with newspapers?

A. Oh, definitely, no, no.

Q. No?

A. No. Those were all studded, 2 by 4's. It was done by a competent company. I mean a contractor with carpenters.

Q. As I also understood you, this is a dirt field, that is, it did not have any concrete or cement runways?

A. That is right.

Q. The ramp you talked about was something where you could park plans and turn them around by hand, but you could not land on them, could you?

A. No, sir.

Q. This field was a large field, you said.

A. Yes.

Q. Comparatively large?

A. Yes.

Q. Did you ever use all of the field?

A. I will say yes, more or less, with the favorite
267 wind direction, we landed into the wind, and—

Q. I see. You needed a line of flight?

A. That is right, a line of flight.

Q. I understand. You are not an engineer, that is, a sanitary engineer, you don't know what the facilities would have to be per person for proper sanitation, how much water a person uses a day, and so forth?

A. Not from an engineering standpoint, but from a technical standpoint and experience I have a pretty good idea because I have done that work.

Q. How many gallons of water would a person use for the purpose of toilet facilities and washroom facilities?

A. Gallons of water per day?

Q. Yes.

A. I would average out about 150 gallons a day, but that is knowledge I picked up on my own, it is not technical or engineering knowledge.

Mr. Swanstrom: I think that is all.

Redirect Examination by Mr. Ashenden.

268 Q. You said something about the ten employees. Did this include the flight instructors who were around the place?

A. I will have to say we run part time help and full time help. There are times we—

Q. How many flight instructors alone did you carry at a maximum time?

A. Maximum time, peak, we carried as high as fifteen instructors.

Q. Flight instructors, is that right?

A. Flight instructors alone.

Q. And how many maintenance men did you carry?

A. Carried approximately about four.

Q. Were there any mechanics who worked there?

A. Yes.

Q. How many?

A. Four mechanics.

Q. Any other employees?

A. Yes.

Q. What kind or classification would they be in?

A. Employees taking care of our records, our office.

Q. Did you have a secretary there?

A. Yes, we had a secretary.

269 Q. Who was that?

A. Miss Mary Moser took care of all our records, our flight records and our correspondence and general office work.

Q. Does that cover the employees then, Mr. Rogers?

A. Yes, that covers the employees pretty well. That varied when we had a very seasonal weekend, we added on additional instructors. That is where the variation may come in with employees. Full time employees were very, very little.

Q. The 300 students you mentioned were not for the whole seven and a half years of your lease, is that right?

A. No, no. That was the maximum, 300 students we had enrolled in a period.

Q. At any given time, isn't that right?

A. As far as putting cadets through and flying students, we probably put through several thousand through.

Mr. Ashenden: I think that is all.

Recross Examination by Mr. Swanstrom.

270 Q. After that, let's see what revision you would make in your figures as to the employees you had out there. Would you change your figure? You said ten, and I said ten to twenty.

A. Well, I will add this, that full time employees probably would average ten or twelve. If we talk about part time help, there are times I will say we have used, added instructors, three or four or five added instructors.

Q. So I was not so far wrong then, between ten and twenty?

A. They are paid by the hour. They are not really registered on the payroll as a full time payroll person.

Q. Well, all right.

A. And it could work both ways.

Q. We will go back to that trailer camp for a minute. I do not suppose you know whether or not your company had a state license to operate a trailer camp?

Mr. Ashenden: I object, if the court please.

The Court: I think we might as well get the whole
271 picture. Objection overruled and he may answer if he knows.

The Witness: Well, I don't know of a state license, if it was required. I never had—

Mr. Swanstrom: That is all.

Redirect Examination by Mr. Ashenden.

Q. Did the Navy see the restaurants when they came around in their inspections, the restaurants and store?

A. Yes, we would stop and have coffee together once in a while.

Mr. Ashenden: That is all.

The Court: All right, witness excused.

(Witness excused.)

Mr. Ashenden: Miss Mosier, will you take the stand, please?

A Juror: Could a member of the jury ask a question about who the people were that lived in the apartments,

whether they were students or employees? Would that be fair?

Mr. Ashenden: I think we can bring it out with 272 the next witness.

The Court: We can wait until that is brought out, and then we will see.

MARY A. MOSIER, called as a witness herein on behalf of defendants, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Ashenden.

Q. Will you state your name, please?

A. Mary A. Mosier.

Q. Is it Miss Mosier?

A. Yes, miss.

Q. Where do you live?

A. 6405 N. Newcastle, Chicago.

Q. What connection did you have with the Illinois Aircraft Company?

A. I was office secretary.

Q. From what period?

A. From February of 1952 to October 6 of 1954.

Q. With respect to the office secretary, what were your duties?

A. I collected the rent from the trailer park. I also rented the trailer spaces. I collected rent from the 273 apartments and barracks. I also rented the apartments, and any services that tenants may have desired, they came to me for that.

Q. Where did you live at this time?

A. I lived in an apartment in the barracks.

Q. What kind of an apartment did you have?

A. I had a 1½-room kitchenette.

Q. What improvements were in that?

A. There was a full size kitchen sink, kitchen cabinets, a stove and refrigerator.

Q. Would you continue then with your duties as the secretary?

A. And we had bedrooms under the GI bill, and I enrolled the students in flying, and I kept a daily record of each hour that they flew, daily, and at the end of the month I totalled their number of flying hours and the amount of money they had spent and in return I prepared vouchers for the total number of hours and the amount of money spent by each student, and the vouchers were sent to the Veterans Administration for payment for the flying for the month.

Q. All right. That is a pretty long spiel. Were there any other duties that you had?

274 A. Well, we had customers that owned their own private airplanes, and they rented hangar space and also outside tie-down for their airplanes.

Q. Was that a source of income to the operation, to your knowledge?

A. Yes.

Q. Can you tell us who resided in either the trailers or the barracks or both of them?

A. Well, there was the average working people.

Q. Did they all work on the premises?

A. No. They worked in various factories in the suburbs, and there was a school teacher from Mt. Prospect there, there was a postal employee that lived there, and there were two retired couples that lived there in trailers. And of course I myself lived there.

Q. Did some of the people that worked on the place live there too?

A. Yes. There was one mechanic, two maintenance men and one instructor, and I believe that is all.

Q. From your experience in renting and being in your secretarial services there, what can you say with respect to occupancy of both the barracks and the trailers?

275 Q. Do you know of your own knowledge whether there was a housing shortage during this period?

A. There was to some extent a housing shortage, yes.

Q. How many people would say were on the premises altogether, living there, either in the barracks or in the trailers?

A. I would say there was 500 or better.

Q. Can you tell us what types of apartments were in the barracks and what rentals per month were received therefor?

A. There were 1½-room kitchenettes and there were 2½-room kitchenette apartments in the building, and the rent varied, depending upon the size of the apartment.

Q. What were the rents for the smaller ones?

A. They were $40.

Q. A month?

A. A month.

Q. How about the other ones?

A. $40, and some were $60 and $75 apartments.

Q. What about the $75 apartments? Why were they higher?

A. $75 a month apartments were larger apart-

276 ments, and then we had a few $80 a month.

Q. Do you mean the rooms themselves were larger?

A. Yes.

Q. Two and a half rooms?

A. Yes.

Q. And then did you have any other classifications?

A. Yes. There were a few apartments that were partly furnished.

Q. And what were the rentals on those?

A. They were $80 a month.

Q. What about a trailer space, Miss Mosier? What was the rental monthly on that?

A. $22 a month.

Q. In addition to your activities as secretary and doing what you told us you did, was there a chief flight instructor there?

A. Yes, there was a chief flight instructor.

Q. Do you recall his salary?

A. He was making between $5500 and $6000 a year.

Q. And what were his activities?

A. He was the chief pilot and he was in charge of the flight operation itself. He did flight instruction. He also issued private licenses and commercial licenses to the students.

277 Q. What can you tell us with respect to the appearance of the place from the standpoint of cleanliness, sanitation and that type of thing? I mean by that the whole place, the barracks and the trailer park.

A. I would say it was average. It was clean. The building was well heated and they had plenty of hot water at all times in the building and in the trailer park.

Q. How many children were living in some of the families?

A. There were seven children, seven to eight children in some families.

Q. Were all of your tenants the neat type of people?

A. No. I would say that a small per cent, about ten per cent were a little untidy.

Q. You lived there yourself from 1952, better than two and a half years, is that right?

A. That is right.

Q. Was there a bus service used in connection with this, or operated in connection with this whole operation?

A. There was bus services on the premises, yes.

278 Q. Who was supplying those?

A. It was owned by an individual that was a tenant there in the building.

Q. But that was used for the people on the facility, is that right?

A. That is right.

Q. How many children would you say were on the premises altogether in the trailer park?

The Court: What does that have to do with the case, counsel?

Mr. Ashenden: I was going to go into the school situation.

The Court: All you want to do is to get into what the gross income was. Perhaps the Government might be entitled to go into some of these things on cross examination, but you are getting into a lot of detail, such as counting leaves on trees. We just want to know what kind of trees there were there.

Mr. Ashenden: All right.

You may cross examine.

Cross Examination by Mr. Swanstrom.

279 Q. $22 for the trailer site, did they pay anything for their other facilities, the lights, and so forth?

A. They paid their own electricity. Each trailer had its own meter and they had their own electric bills themselves.

Q. The only thing you charged then was rent?

A. Yes.

Q. In connection with your duties as secretary did mail come to you first?

A. I received all mail.

Q. You opened the mail?

A. No, I did not open all the mail, no, sir.

Mr. Swanstrom: No further questions, as long as you did not open the mail.

The Court: All right, witness excused.

(Witness excused.)

(Thereupon an adjournment was taken until 10:00 o'clock a.m. of the following day, April 11, 1957.)

280

(Caption—No. 54 C 1468)

(Filed—Oct. 3 1957)

Before Judge Perry and a jury, April 11, 1957, 10:00 o'clock a.m.

Trial resumed pursuant to adjournment.

Present: Same as before.

The Clerk: 56 C 1468, United States of America v. 93.970 Acres of Land, on trial.

The Court: Counsel, you may proceed with your next witness.

Mr. Ashenden: Mr. Stoffels, will you take the stand, please?

HERBERT R. STOFFELS, called as a witness herein on behalf of the defendants, being first duly sworn, was examined and testified as follows:

281 *Direct Examination by Mr. Ashenden.*

Q. Will you please state your name?

A. Herbert R. Stoffels.

Q. Where do you live, Mr. Stoffels?

A. I live at 137 N. Merrill Avenue, Park Ridge, Illinois.

Q. And what is your business or occupation?

A. By profession I am an attorney.

Q. You are duly licensed to practice, of course, in this state, is that correct?

A. Yes, sir, since 1928.

Q. Do you have any particular acquaintance or knowledge with the field of aviation, Mr. Stoffels?

A. Yes, sir.

Q. Would you relate to the jury your background in that field?

A. In the latter part of the thirties I commenced flying. My original instructions, I believe, took place in 1938. Since then I have sought to broaden my knowledge in that field, and am at the present time the holder of a Civil Aeronautics Administration certificate as a commercial pilot, with an instrument rating and an in-
282 structor's rating. In addition to that I became interested financially and professionally in the representation of several airports at—

Q. Can you name a couple of those?

A. Yes. In 1947 I represented the Association of Airport Operators.

Q. What did that consist of, that association, Mr. Stoffels?

A. That consisted of the operators of all of the private fields in Chicagoland, commencing on the south with Rubincam, Fort Lansing, and running as far north as Waukegan.

Q. How many altogether were involved in the association, in round figures?

A. I would say probably twenty, twenty-five

Q. In the course of your duties, as attorney and as representative for this association, did it become a part of your activities to acquaint yourself with a knowledge of the operations of these airports?

A. It did, sir. One of the principal legal obligations that I received in that regard was the appearance before the Illinois Aeronautics Board in connection with
283 their survey of the future of aviation projected up to 1970 in the Chicagoland area, and in that regard I appeared and presented objections to a preliminary proposal that they had presented.

Q. Is there any other thing you could tell us about your background in aviation?

A. I became affiliated professionally with Ravenswood Airport, Palwaukee Airport, and the corporation which was the operator of Palwaukee Airport up to 1945 was one in which I became the general counsel, a shareholder and a director and secretary. I retained those offices and obligations after the operator corporation moved out of Palwaukee and moved to Elmhurst Airport. I am also—

Q. When did that move occur?

A. I beg your pardon?

Q When did that move occur?

A. In 1945.

Q. What was the name of that corporation that operated at Elmhurst?

A. The corporation previously operating Palwaukee and then operating Elmhurst Airport was Tufts, Edgcumbe, Inc.

284 Q. Did that corporation operate its facility at Elmhurst as an owner of the fee of the property or otherwise?

A. No, sir. In 1945, as attorney for the corporation, I negotiated a lease from the owners of some 130 acres on Lake Street and Route 84, that is the northeast corner.

Q. Now, was this lease operation, the way that they

continued, in one continuity during the course of the operation through the years?

A. Yes, sir.

Q. How long did they operate under the terms of this lease? Until what year was that?

A. We closed the operation on December 31, New Year's Eve, 1956, that is some three months ago.

Q. Can you tell us the background of that particular occurrence, sir?

A. During the early part of 1955 our landlords advised us that Commonwealth Edison Company had presented them with an offer and a demand, and failing to accept it condemnation would be started for the purpose of erecting a high power line through the middle of the airport. The power line was to convey power from 285 Joliet to the Franklin Park and northern Chicago area.

Q. When did this first notification come to the attention of this corporation that was operating the lease?

A. I estimate that to be during the first few months of 1956.

Q. Can you tell us then what happened in connection with this?

A. Thereafter, Commonwealth Edison Company communicated with me directly and advised the necessity of the power line and stated that if they were required to they would exercise their right of condemnation.

Mr. Swanstrom: If the court please, this is interesting, a very aggressive and successful professional life that has been described—

The Court: Do you have an objection?

Mr. Swanstrom: But I don't see its pertinency—

The Court: Do you have an objection?

Mr. Swanstrom: And I object to its materiality, and if these questions—

The Court: All right, objection sustained. I don't
286 see why we should go into this unless you have got something pertinent—

Mr. Ashenden: I have, definitely, something in the next question, if the court please, something very specific.

The Court: Well, ask the question.

Mr. Ashenden: I had to lead up to this, Judge.

The Court: Let us see what it is. I can't see so far what it has got to do with it, but ask it.

By Mr. Ashenden:

Q. As a result of these negotiations, was there a sale of the leasehold interest that this corporation had—strike out that portion of it first.

How much time remained at the time these negotiations were coming to a conclusion, to run on the leasehold of this particular corporation?

A. Of the Elmhurst Airport?

Q. That is right.

A. The lease had as its expiration date April 30, 1958.

Q. And when were these negotiations in a conclu-
287 sion stage?

A. They were placed in escrow effective as of January 1, 1957.

Q. So what term remained to this leasehold? That is what I am getting at.

A. One year and four months.

Q. Was there a sales price that was established and paid by the Commonwealth Edison Company for this leasehold interest to this corporation for this one year and four-month period?

Mr. Swanstrom: Just a moment.

The Court: Objection sustained.

Mr. Ashenden: If the court please—

The Court: What has the price of another leasehold to do, counsel, with the value of this leasehold; it would depend a great deal on what the evidence was.

Mr. Swanstrom: Not only that, but you are dealing with a company that has the power of condemnation, and under those circumstances you cannot introduce that kind of evidence.

Mr. Ashenden: If the court please, I believe we
288 are entitled to show, in arriving at a foundation for Mr. Stoffels' opinion ultimately as to the fair cash market value of this leasehold, as to what his background is in comparable sales. As you know, if the court please, it is most unusual to have an airport in the first place. It is even more unusual to have an airport that is approximately in the same size of 100 acres, and even still more, to have a sale and a price occur as a result of this.

To that extent I feel, if the court please—

The Court: You have shown his background and his knowledge. You can ask him any question as an expert on the question at issue, but for use to find out what the value was in a particular one might be held to influence the jury unfairly as to what the value in this particular case should be. There might be no relationship. But for the purpose of showing his background, his experience, and his qualifications to testify concerning questions that you may ask him about this airport,
289 you may ask him those, but counsel is absolutely right on the other.

Mr. Ashenden: As to the price?

The Court: Absolutely.

Mr. Ashenden: All right, fine.

The Court: Proceed.

Mr. Ashenden: We will get to the other question later.

Q. In addition to your other activities, do you hold any official position with any of the villages or cities in this area?

A. Yes.

Q. What is that?

A. As attorney I am presently the City Attorney for the City of Park Ridge.

Q. In connection with your operations in the field of aviation again, now, Mr. Stoffels, are you familiar with the income from sales of aircraft as part of an operation of an airport?

A. Yes.

Q. What other items of income, relating to flight only now, and to things pertaining to aviation, are
290 there in connection with a private airport operation?

Mr. Swanstrom: If the court please, that is quite general, the same objection as your Honor noted in the other one. Let him state if he knows the income from this airport if he wants.

The Court: You are now going to his qualifications, that is all this would be for. I think he may answer.

Mr. Swanstrom: Just as long as he stays there, but if he is going to ask what the income is, and from what, that I think is too much.

Mr. Ashenden: I haven't asked him that.

The Court: There is nothing wrong with that. You would be entitled to cross examine him on that, on what he does know about it, about income properties.

Mr. Swanstrom: So far I am not going to cross examine.

The Court: That is not harmful.

Mr. Ashenden: The specific question of how much was not asked.

Q. Are you familiar with what the other cate-
291 gories of income are?

A. Yes.

Q. What are they, Mr. Stoffels?

A. In the first place, there are the rentals from the tying down of privately owned aircraft. In the next place, there is the matter of the rental of hangar space to private owners. Then there is the operation known as the flight school. Then there is the operation of aircraft rental as distinguished from flight school. Then there is the operation of aircraft sales and equipment sales, and in addition on some airports there is the income from subletting to other flight schools who may be operating on the port, and usually that is done by charging a runway rental fee in addition to a base fee.

Q. In these categories—

The Court: I hope the jury understands the distinction I am making is not a technical distinction. If he were asking him about a particular airport and getting the details as to how it is so as to compare it with this one so as to establish a value, I would not permit it, but
292 to establish a knowledge as to what these various components are, I have permitted him to testify on that.

The Witness: May I add one other factor in that regard?

By Mr. Ashenden:

Q. Yes.

A. There is the—

The Court: You see, I have known you so long, I know about your activities. I was inclined to cut you a little short. I am sorry.

The Witness: I won't feel offended if your Honor does.

Mr. Swanstrom: I am pretty envious of him myself.

The Witness: One factor that I had forgotten and is nevertheless an important factor is the leasing of space to the repair shop.

By Mr. Ashenden:

Q. Is it sometimes a factor that the machine shop, repair shop, maintenance shop, may also be conducted and operated by the same agency?

293 A. Very frequently.

Q. That may also be an additional source of income?

A. Usually; if that is done you don't lease out to a competitor to compete with you in that regard, however.

Q. Did you include in your categories the chartering of aircraft for flight?

A. I spoke of the rental of aircraft, and I included that because frequently the person who is renting the plane is unqualified in the operation of the plane, and then you furnish the pilot in addition.

Q. Do you have an opinion based upon your experience—first let me ask you this. Were you familiar with the operation at Arlington Field?

A. Yes, sir.

Q. Will you state—

A. Not in the greatest detail, but I was quite familiar with it, yes.

Q. Well, in what way did you become familiar with it?

A. I had spent quite a bit of time up at Arlington with Mr. Fishman, Mr. Rogers, several other persons
294 up there, and persons who had tie-down aircraft. In other words, I landed there on numerous occasions, and have been in the hangar and in the flight office.

Q. Are you familiar, then, with the physical facilities of that airport?

A. Yes, sir.

Q. How do you compare the physical facilities of that airport with any other private airport during the period from 1947 to 1954—

Mr. Swanstrom: Objection.

By Mr. Ashenden:

Q. —in the Chicagoland area?

All right. Excuse me. I will qualify that, as of October 6, 1954, with any other airport in the area?

Mr. Swanstrom: Objection.

The Court: Read that question again, as it was modified.

(The question was read by the reporter as follows:

"Q. How do you compare the physical facilities of that airport with any other private airport as of 295 October 6, 1954, with any other airport in the area?")

The Court: In the area of Cook County?

Mr. Ashenden: That is correct.

The Court: In northern Illinois?

Mr. Ashenden: Yes.

The Court: Objection overruled. He may answer that.

By the Witness:

A. The facilities and the air space in relation to Arlington Airport compared very favorably with any other airport.

By Mr. Ashenden:

Q. Now, particularly with respect to the hangar, were you acquainted with that installation of that physical property?

A. The large hangar that they had there was. I think, out of the ordinary in that the average private airport neither had nor could have one that large.

Q. Do you have an opinion, Mr. Stoffels, based on your experience and your acquaintance with the operation at Arlington, as to what the minimum yearly net sales of

aircraft would be during the period 1954, 1955, 1956?
296 Do you have such an opinion?

A. That would depend, of course—

Mr. Swanstrom: He ought to answer the question yes or no.

By Mr. Ashenden:

Q. Do you have an opinion?

A. Yes.

Q. What is that opinion?

Mr. Swanstrom: I object to that, your Honor. The reason for my objection is that the profits that might be anticipated from an operation are entirely too speculative to become any element in fixing compensation in this kind of a case.

The Court: There will be no question but what that is true, and the jury will be instructed so, but this evidence is solely offered for the purpose of trying to determine the value of the real estate. What anticipated profits might have been made—

Mr. Ashenden: That is correct.

The Court: —cannot be the measure of damages. It is only such evidence as would indicate what this
297 property, this leasehold could have been sold for, is all that is admissible. It is opinion evidence, and the same as the other witnesses have had, and I think the answer may be made. Objection overruled.

Mr. Swanstrom: If the court please, don't you think that the question should be, has he an opinion as to the fair cash value of this leasehold?

Mr. Ashenden: That will be the next question.

Mr. Swanstrom: I know, but this other is thoroughly objectionable and misleading.

Mr. Ashenden: No, because this is an important—

The Court: I think this is a factor that must be taken

into consideration in arriving at the value. The jury will understand that when they get their instructions. I never underestimate the intelligence of a jury being able to draw a distinction between those, and I will instruct them that they are to consider only the value of the leasehold, and that all these other things that they have heard about,
298 possible income and so on, are not to be considered as the measure of damages, but only those things are to be considered that they hear, both that it has no value and there is a great amount of money that could be made, will just be considered for the purpose of determining, trying to determine what if any value the leasehold had. He may answer.

The Witness: May I have the question restated?

The Court: Yes. That is a good idea.

(The pending question was read by the reporter.)

The Court: I take it that it is further qualified on the theory of the point as he knows it, as to this particular airport.

By Mr. Ashenden:

Q. Yes, as it relates to Arlington Field, in your experience.

A. Based on my experience the capabilities of sales at Arlington Airport would be somewhere between one million and one and one-half million per year—

Q. This is gross sales, is that right?

299 A. That is right.

Q. I asked you what the net sales figure would be on the same period.

Mr. Swanstrom: I will object to that.

The Court: Objection sustained. All we are allowing him to do is to give a general picture, there is so much involved, management, and all the other things about net income, your objection is good on that.

Mr. Swanstrom: You will pardon me, we have the record to think of, I move that this last answer be stricken.

The Court: He did not answer the last question.

Mr. Swanstrom: No, I mean the answer—

The Court: I see. Motion denied.

By Mr. Ashenden:

Q. Mr. Stoffels, will you tell me what in your experience as relates to gross and net sales, not talking now about expenses of operation including, I am talking only of gross and net sales figures before other expenses, only with relation to commission, for example, gross and net sales figures only with respect to taking a commission—

The Court: What you are trying to find out is 300 what the markup is?

Mr. Ashenden: Yes, that is right, Judge.

The Court: Ask him that. Ask him what the percentage of markup is on the sale of airplanes and the other parts.

Mr. Ashenden: That is right.

Q. What is that figure?

A. A dealer derives a commission or a markup varying between 15 and 20 per cent. In one aircraft I know of it is 19.6. In other words, I have to leave a spread in there, depending on the manufacturer and the type of aircraft.

The Court: Then he has to pay his expenses out of that?

The Witness: That is right.

Mr. Ashenden: After that, yes.

The Witness: Yes.

The Court: And that depends on his location, his luck, his ability—

Mr. Swanstrom: How many sales he makes.

The Court: —and adversities, and so on, as to whether he makes a profit?

The Witness: Yes.

The Court: All right.

By Mr. Ashenden:

301 Q. What types of planes are sold, and what are the prices category-wise for some of these planes in the Chicagoland area?

A. Might I add that my experience has been sparked by the Piper aircraft line.

Q. All right.

A. That is probably the greatest seller, and that comes in a variety of classes. Am I asked the price range of those?

Q. Yes. What would the range be of prices on that aircraft?

A. In the Piper line, and I believe the Cessna line is perfectly in line with it and probably a bit higher, the small training ship runs around $5,000—

The Court: I don't think we are interested in the details of it. You have given us the spread—

Mr. Swanstrom: We just might want to buy a plane. Of course, I would hate to pay for this record.

By Mr. Ashenden:

Q. Let me just ask you one more question. What was the highest priced plane? You have mentioned the lowest.

Now give us the highest priced plane in the Piper and
302 Cessna line.

A. The twin-aircraft in all of the lines come in the—

Mr. Swanstrom: Judge, I wouldn't be interested in the highest class. I could never reach it, and I object to this.

The Court: I don't believe we need to know the details of these prices. We have allowed him to tell what

the gross is. It doesn't make any difference whether he sells flivvers or limousines.

Mr. Ashenden: Except I think that the jury may not have an impression as to what the price can get to, for gross figure purposes, on this kind of sales.

The Court: He has told them.

By Mr. Ashenden:

Q. You have stated that in your opinion the gross sales figure of aircraft for Arlington during this period would be what, now, again?

A. Between one million and one and one-half million per year.

Q. Per year?

A. Yes.

Mr. Swanstrom: Did he say sales—

303 Mr. Ashenden: Sales from aircraft.

Mr. Swanstrom: He didn't say general income?

Mr. Ashenden: No, just sales from aircraft, one or one and a half million per year.

Q. How many aircraft would it take to sell to arrive at this figure, in your estimation, how many would you have to sell?

Mr. Swanstrom: Judge, this is just expensive in the record.

Mr. Ashenden: This is important, Judge, because I am trying—

The Court: This is all just detail, as far as that is concerned, and I don't see that you have to go into that. We could detail and go into each and every one of them. That is something for cross examination. If they want to know what he really knows about it, they can go into that, but I don't think we need it on what you call a prima facie case. He has testified as to his opinion as to what the gross is. If anybody wants to question it they can

break down the figures, ask him to break them down.
304 Mr. Ashenden: The objection is sustained, then, Judge?

The Court: Yes, I sustain the objection. We don't need to go into all that.

Mr. Ashenden: I will go to the next question, then.

Q. Based upon your experience and your knowledge in this operation at Arlington, then, Mr. Stoffels, do you have an opinion as to the fair market value of the leasehold of Arlington Field from the period of October 6, 1954 to May 2, 1957, considering the flight operations that you have described only?

A. That is two and a half —

Mr. Swanstrom: Have you an opinion?

By Mr. Ashenden:

Q. Do you have that opinion, sir?

A. Yes.

Q. What is that opinion?

Mr. Swanstrom: I object to that. There has not been sufficient —

The Court: Objection sustained until we find out whether or not he has considered the lease, such as we
305 had from the others. I think that question should be asked, he should take that into consideration.

Mr. Ashenden: All right. I will qualify the question in this way, if the court please.

Q. Assuming —

The Court: If you want to ask him the question of what it would be worth if there were no clause at all, so that it would be clear you might ask him that, but that would make quite a different story.

Mr. Ashenden: Yes. All right. I assume that on cross examination they can cover that part of it.

The Court: No, I think you ought to ask him now

whether he has seen the lease and knows what the terms are. That would seem to be the proper thing now.

By Mr. Ashenden:

Q. You have not seen this lease?

A. I have not.

Q. I will ask you, assuming that the lease could be cancelled only in the event the Government wanted to acquire this property for purposes of Naval aviation, with that assumption, sir, and assume further that
306 that likelihood of then acquiring it for that purpose is remote, do you have an opinion as to the fair market value of the leasehold, considering your experience and your knowledge of this field in particular?

A. Yes.

Q. For the period from October 6, 1954 to May 2, 1957, as to flight operations only?

Do you have such an opinion?

A. May I ask whether you are including in flight operation the matter of sales?

Q. Pardon me, I meant flight; in other words eliminate any trailer facility, or anything like that.

A. Yes.

Q. You have that opinion?

A. Yes.

Q. What is it?

Mr. Swanstrom: I object to that for two reasons, at least.

One reason is that he has not demonstrated that he is sufficiently acquainted with these operations. He has flown into this airport in his business, he knows some of
307 these men and he has talked with them, and he sees it is a very wonderful hangar. Naturally it would be, built by the Government. He has not seen the lease.

And as your Honor has so wisely stated, without a knowledge of the conditions under which the occupancy would have to be assumed, no potential purchaser would consider paying anything, and this witness, excellent as he is on many things, certainly is not qualified to give an opinion as to value in this case, not having studied the lease — it is not only the cancellation clause, but it is all the conditions of a lease when you are testifying to the value of a right of occupancy, you have got to know what that purchaser has to assume.

Mr. Ashenden: If the court please —

The Court: The first objection goes to the weight that may be attached to this witness' testimony. The second objection was the same as was made before which the court suggested, that either he should see the lease or else the question should be put to him upon a hypo-
308 thetical basis. You placed the question the second time on the hypothetical basis in line with your theory of the case, and that is that this lease could be terminated only if the Navy wanted it for an airport, and what the prospects were.

With that in mind, objection overruled, he may answer the question.

The Government has answered it on the theory that it could be used for any purpose, not Naval aviation alone.

Mr. Swanstrom: Governmental purpose, your Honor.

The Court: What is that?

Mr. Swanstrom: Governmental purpose.

The Court: I mean, any governmental purpose. In other words —

Mr. Swanstrom: The reason I say that is —

The Court: — it might build a farm there, it might build a prison there, it might use it for —

Mr. Swanstrom: The reason I say that is —

The Court: —any governmental purpose. You are correct.

Mr. Swanstrom: The reason I say it is not face-
309 tious.

The Court: No, I know it isn't.

Mr. Swanstrom: The lease provides definitely that these lessees are protected against the Government leasing these premises to an individual.

The Court: That is right.

Mr. Swanstrom: It is only for governmental purposes that they may cancel this lease.

The Court: There is no question about it, nobody disputes it, the Government couldn't take it just to rent it to a farmer, but the Navy could take it for its own farm —no, I wouldn't say that they can. That is the question. The defendants say that the Navy can only use it for airplane purposes, for an airfield. Your position is that they can take it for any governmental purpose.

You admit that they couldn't take it and rent it out and sublease it —

Mr. Swanstrom: To an individual.

Mr. Ashenden: That is not at issue, Judge.

The Court: That is beside the point as I see it
310 here. I think this witness is entitled to give his opinion on your theory of the case upon a hypothetical question, just the same as the Government's was. So he may answer.

You may state what your opinion is.

The Witness: In my opinion, the value of that lease for that period of time, upon the hypothesis —

The Court: By that you mean the leasehold?

The Witness: The leasehold, yes, your Honor, would be a minimum of $100,000 and a maximum of probably $130,000 or $140,000.

Mr. Swanstrom: I ask that his answer be stricken, your Honor.

The Court: Motion denied.

Mr. Ashenden: You may cross examine, Mr. Swanstrom.

Mr. Swanstrom: No cross.

Mr. Ashenden: Thank you very much, Mr. Stoffels.

The Court: Witness excused.

(Witness excused.)

311 The Court: Call your next witness.

I think we will take a short little recess before you call the next witness.

Mr. Ashenden: All right, Judge.

(A short recess was taken.)

The Court: You may proceed.

HOMER COFFMAN, called as a witness herein on behalf of the defendants, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Ashenden.

Q. Will you state your name?

A. Homer Coffman.

Q. What is your address?

A. 845 Greenview Avenue, Desplaines, Illinois.

Q. What is your business or occupation?

A. Trailer park manager.

Q. Do you have such a trailer park at this time?

A. I do.

Q. Where is that located?

A. 1950 River Road, Melrose Park, Illinois.

Q. How long have you operated that, sir?

A. Approximately seven years.

312 Q. How many trailers do you have in your place at the present time?

A. 346.

Q. Prior to this, Mr. Coffman, did you have any acquaintance or familiarity with the trailer operation located on Arlington Field?

A. I did.

Q. How were you so acquainted?

A. I had a working partnership in the trailer park operation.

Q. What year was that, Mr. Coffman?

A. In the year of late 1947 or early 1948.

Q. Did you have to do with the early construction, the original construction of the site, the trailer site?

A. Yes, I did.

Q. You did?

A. Yes, sir.

Q. Who was with you in this construction?

A. The Illinois Aircraft.

Q. And how many sites were constructed?

A. As I recall it there were 118 permanent sites.

The Court: 118 Separate trailers?

The Witness: That is right.

313 Mr. Ashenden: Sites.

The Court: That meaning a place for a trailer?

The Witness: Yes.

The Court: A site being a place for a trailer to attach?

The Witness: Yes.

By Mr. Ashenden:

Q. Do you recall how many square feet were allotted to each site?

A. There was 1000 square feet plus; they were 1000 or larger.

Q. And was there additional area immediately around these sites to allow for an increase if ever necessary of each trailer site area?

A. Yes, there was.

Q. How much more could it be increased?

A. Well, on most of the sites they could have been increased to almost any size in length.

Q. Why do you say that?

A. Well, the trailer park, the perimeter of it could have been extended out to the back of each trailer site.

Mr. Ashenden: May I have the picture, Exhibit 3?

314 Mr. Swanstrom: Yes.

By Mr. Ashenden:

Q. I show you then this Plaintiff's Exhibit 3 for identification, and ask you if you recognize the picture portrayed in this exhibit?

A. Yes, I do.

Q. Is this the trailer site at Arlington Field?

A. Yes.

Q. Now, when you say these sites could be extended, you mean that those at the perimeter could be extended backward, is that right?

A. Backward, that is right.

Q. And at the same time the other sites, when these are extended backwards, could also be enlarged?

A. That is right.

Mr. Ashenden: Ladies and gentlemen, you have seen that before, I think.

Q. What type of sewage system was installed in connection with the trailer sites?

A. We put over, I believe it was an 8-inch or 6, I am not positive which it was, from the existing sewer, we extended it to what we call the trailer court, and then

315 we put in, vitreous tile was put under each trailer, there was a main put under the trailer lines around

through the park, and then there was a 4-inch riser that came up from the sewer itself up to the trailer where the trailers were able to hook onto.

Q. Then this sewage system you hooked into, what did that go into? Will you explain further the rest of the system?

A. That went into a septic system that was existing at the time that we started the trailer park, apparently had been put there by the Navy.

Q. Was there any at the time you constructed these trailer sites or any other time in the future during the time that you were there — excuse me, strike that out.

How long did you stay connected with this, how many years did you stay connected with this operation?

A. I think it was a little over three years.

Q. Now, during the time that you were connected with this operation, was there ever any opportunity to connect up into city sewage in any way, or ordinary sewage other septic tank system?

A. No, there was not.

Q. Are you familiar, Mr. Coffman, in the opera-
316 tion of your business, with other trailer facilities throughout Cook County?

A. Yes.

Q. And of these other trailer facilities in Cook County would you say that a number of them are also on the septic tank system?

A. A very large percentage of them are.

Q. A large percentage —

A. Yes.

Q. — are on that same system?

A. Yes.

Q. What commonly occurs in connection with a septic tank system, whether it be in connection with a trailer operation or even in the instance of a private home, or

an industrial operation where such is the sewage system?

A. Well, you have maintenance on them. The filter beds, they have sand beds where the floor comes through the septic tank and goes through a saddling bed, and then it drains off into a sand filtering bed, and that sand must be replaced at times, it has to be taken off and new sand put in, and upon occasions your septic tank must be cleaned.

Q. Is there a common complaint common to that
317 particular type of system that you are aware of?

Mr. Swanstrom: I object to that, your Honor.

Mr. Ashenden: I think he is qualified as an expert on these systems.

Mr. Swanstrom: Who is interested in the common complaint? If he would ask what the complaints were against this particular system I would have no objection.

Mr. Ashenden: I am just trying to explain the circumstance —

The Court: I think he may define all the weaknesses as well as the strengths of it.

He may answer. Objection overruled.

By the Witness:

A. Well, from a septic system, which is quite common in homes or trailer parks, or as I say any operation where there is a septic system, where the effluent comes through and drains out at its final disposal, you have an odor from it.

The Court: You have what?

The Witness: An odor, a smell.

By Mr. Ashenden:

Q. And how is this, from a maintenance standpoint, corrected?

318 A. Well, by the constant change of the sand beds, the filtering beds, and cleaning of the tanks.

Q. Now, do you know of your own knowledge during the time that you were connected with this operation, do you know the percentage of occupancy of these trailer sites from the time that you first installed them?

A. Well, from its inception it was practically 100 percent occupied all through the years that I was there.

Q. And did you keep an acquaintance with this operation even after you left there?

A. Yes, I did.

Q. And what would you say existed right up to October 6, 1954, if you know?

A. I would say that it was practically 100 percent occupied at all times. There has been a shortage of trailer spaces throughout the Chicago metropolitan area which exists today.

Q. In addition to establishing the sites in particular for these trailers, was there any other structure erected in connection with this operation?

A. Yes.

Q. What was that?

319 A. There was a cement block building erected as the shower rooms, toilets and a disposal plant there.

Q. Do you have a recollection of the cost of the permanent improvements put in in connection with this trailer operation only?

A. It was somewhat over $30,000. As I recall it, I think it was around $30,000, nearer $31,000.

Q. Do you have an estimate as to what it would cost to remove these items to restore the property to its condition, the condition that it was in before these improvements were put in?

A. Do you mean to take the building down?

Q. Take the building down, take the pipes out.

A. Well, it was a cement block building, it was just a

shell of a building.

Q. Do you have an estimate?

A. I would say $1,000.

Q. $1,000?

A. Yes.

Q. Are you familiar with the installation of the barracks building and the improvement in the barracks building?

A. To a modified degree, yes.

320 Q. Do you know what type of improvements were put in, the barracks building?

A. Yes.

Q. What was it, sir?

A. The building was divided up into separate rooms, creating apartments.

Q. Now, do you have, Mr. Coffman—what type of walls or partitions were used, if you recall?

A. It was a plasterboard manufactured product.

Q. Do you have an idea of what it would cost to restore the barracks building to its condition before these partitions and apartments were put in?

A. As I recall it, there was no structural changes made to the existing building there. The only thing, this was added and these rooms were put in, added to it.

The Court: The answer he wants to know—

The Witness: I would say—pardon me, Judge.

The Court: Go ahead. You are apparently going to answer that.

By the Witness:

A. I would say $1000 or $1100 would be a large price for it.

321 By Mr. Ashenden:

Q. Do you recall what the rental was for each trailer site at Arlington Field?

A. At the time that I was there it was $18 per month per site.

Q. Well, when you left, of your own knowledge do you know whether that was ever raised?

A. Yes, it was.

Q. What was it raised to?

A. It was raised, as I recall, to $22 per month. I know it was raised to that. Whether it was raised after that again or not, that I don't know.

Q. Mr. Coffman, based upon your experience as an operator of a trailer park and your acquaintance particularly with this operation, and assuming that the lease in question under which this Illinois Aircraft Corporation was operating could be cancelled only in the event the Navy was to take the field back for naval aviation purposes, and in addition that this likelihood was remote; assume now that there was a period from October 6, 1954 to May 2, 1957, some two years and eight months; do you have an opinion, relating now to the operation of the trailer park facility alone, as to what the fair market 322 value of that leasehold would be on October 6, 1954?

Mr. Swanstrom: If the Court please, I object to that. I think there are other elements which should be taken into consideration.

The Court: I will excuse the jury for a moment and hear you on that.

(Whereupon the jury retired from the courtroom, and the following proceedings were had out of the presence and hearing of the jury:)

The Court: The record shows the jury has left the room.

Mr. Swanstrom: Here is a witness who testified that he was operating this thing, this trailer camp; he was a partner up to 1948. That would be about a year, a little over a year.

Mr. Ashenden: He said three years, Mr. Swanstrom.

Mr. Swanstrom: Well, yes, but he was interested. All right, 51, if you want it. He is now operating another plant, and he has not read the lease; or hasn't indi-
323 cated, whether this lease justifies the operation of a trailer camp; whether it was leased for that, or whether or not the lessor at some time might have cancelled or notified the tenant to desist operating a trailer camp. Certainly, he has not given an ample description of the facilities as far as the sanitary restrictions are concerned; and it would be the wildest guess. There is nothing before the jury except a trailer camp, now, a trailer camp operated so-and-so, and on a lease that the Government could not cancel except to use it for naval aviation purposes. And that is all. We know the facts are different, and it would be highly speculative. I don't think he is qualified.

The Court: What facts do you refer to, so the record is clear? Is there any provision in the lease that says it cannot be operated as a trailer camp?

Mr. Swanstrom: No negative provision, but it has this provision. It is leased "to be occupied and used as
324 an airport, and for such other purposes as may be necessary or incidental thereto." That is the object clause. That is the permissible use.

Now, their own witnesses have testified that to have a trailer camp in connection with an airport is very unusual, indicating that, of course, it is not an incident to the operation of an airport. Therefore, it is in direct violation of the lease, and the lessor at any time could say, "Desist."

The Court: Hasn't the evidence also shown that the Navy inspected it regularly?

Mr. Swanstrom: There was a little evidence by some-

one here they were out and inspected, but nothing about approval; and, even so, your Honor, I want to make this point very clear, even if some officer had gone out there, he could not have bound the Government without explicit authority. You do not bind the Government the way
325 you bind an ordinary principal, and in this case there isn't the slightest evidence of an estoppel, would not be from the very earliest Supreme Court decision.

The Court: I believe on that score, but this is pretty broad; what is incidental is pretty broad.

Mr. Swanstrom: If you want to hold it justifies a trailer camp, all I can do is to preserve my objection. As you know, I have got a little toughness in my voice, and I can't keep talking any more than absolutely necessary.

The Court: You have preserved your objection. It opens it up pretty wide for cross-examination here; but on that question concerning his knowledge of what the lease provides, and whether he took that into consideration. I think the objection will be overruled. Mr. Reporter, will you call the jury in?

(Thereupon the following proceedings were had in
326 the presence and hearing of the jury:)

The Court: Mr. Reporter, will you please read the pending question?

(Question read by the reporter, as follows:

"Q. Mr. Coffman, based upon your experience as an operator of a trailer park and your acquaintance particularly with this operation, and assuming that the lease in question under which this Illinois Aircraft Corporation was operating could be cancelled only in the event the Navy was to take the field back for naval operation purposes, and in addition that this likelihood was remote; assume now that there

was a period from October 6, 1954 to May 2, 1957, some two years and eight months; do you have an opinion, relating now to the operation of the trailer park facility alone, as to what the fair market value of that leasehold would be on October 6, 1954?")

Mr. Swanstrom: I have another objection on this, your Honor, and you may as well rule at the same time.

327 You don't value these things piecemeal. The summation theory is utterly improper. He would have to give his value on the entire right of occupancy of the entire thing, not only of a portion of it. You can't value this business. That is the summation theory, and it can't be done.

The Court: Well, I think counsel is presenting it in two parts, in two definite parts, the right to operate an air field, and what the lease was worth, and this the right to operate a trailer camp—two separate and distinct parts there. I think the objection is overruled. You may answer.

By Mr. Ashenden:

Q. Do you have such an opinion? Yes or no?

A. Yes, I do.

Q. What is that opinion, Mr. Coffman?

The Court: Just a second. And your objection to each and every question concerning that is preserved in the record and overruled.

328 Mr. Swanstrom: Yes. As I understand it, all objections that are overruled, they are preserved for the higher court without any special exception being taken.

The Court: Well, I meant to say, so there wasn't any uncertainty about it, you want to object to the opinion, what the opinion is, just the same as you have to the question that he has an opinion.

Mr. Swanstrom: Yes, and I am also objecting that he cannot value one part and not value another part, and so on. We call that the summation theory.

The Court: I just want to keep it clear. All right. You may answer.

By the Witness:

A. I would say between $60,000 and $65,000.

Mr. Ashenden: That is all. You may cross-examine.

Cross Examination by Mr. Swanstrom.

Q. Was that $65,000?

A. Between $60,000 and $65,000, yes.

329 Q. Now, your familiarity with this thing is a date after you left it, which was about 1950 or 1951, something like that?

A. It dates back to the time it was started, sir.

Q. I think my question was clumsy. You left the operation of this camp some time in 1950 or 1951, is that right?

A. Yes, sir.

Q. And since that time you have no intimate knowledge of it or its operation, is that right?

A. No. I do have.

Q. You do?

A. Yes.

Q. You have been visiting there right along?

A. Yes, I did.

Q. When were you last there?

A. It would be hard to say the date, but I kept an airplane at the field there long after I was no longer there.

Q. You would fly in and out?

A. Yes, and I was associated with part of the group that were associated there on other business.

Q. But did you have occasion to examine the records, financial records?

330 A. I did not.

Q. You are not an engineer, are you?

A. No.

Q. Not a sanitary engineer?

A. No.

Q. Not a civil engineer?

A. No, sir.

Q. Of course, you did not examine the sanitation system at these visits?

A. Yes, I perhaps did, because my airplane was tied down right near where the septic system was.

Q. Then you got the smell?

A. I did, yes.

Q. Did you see the effluent in the ditches down along the road on the side?

A. When there was effluent there, yes.

Q. The color was sort of black, wasn't it?

Mr. Ashenden: I object.

The Court: It is cross-examination as to condition. Objection overruled.

By Mr. Swanstrom:

Q. That is more or less black?

A. No, I would not say it was black.

Q. It is not like water; it is bacterial-laden, isn't

331 it?

A. That I would not know.

Q. You are not a chemist?

A. No.

Q. But it did smell?

A. At times, yes.

Q. Now, you are operating a trailer camp now?

A. Yes, sir.

Q. Not in connection with an airport?

A. No.

Q. Do you know any other ones in the 25 or 30 that have been testified to around Chicago that have a trailer camp in connection with it?

Mr. Ashenden: Object, if the Court please. I don't think Mr. Swanstrom has identified what he is talking about, 25 or 30.

Mr. Swanstrom: Airports.

The Court: Airports. That is what I understood he said. He may ask him if he knows of any other.

By Mr. Swanstrom:

Q. Do you know of any other?

A. Well, when you say trailer camp—

332 Q. Well, now, let us be sensible. We are talking about a sizable trailer camp for several hundred trailers.

A. Beg your pardon?

Q. In excess of one hundred trailers.

A. In excess of one hundred?

Q. Yes.

A. No, that I do not.

Q. You have a State license to operate the plant you are now operating, is that right?

A. I have a current license for the preceding year. I have an application in for this year's license, yes.

Q. I am asking whether you have a State license to operate that plant, that tourist camp.

A. Yes.

Q. It is required, isn't it?

A. That is right.

Q. That law went into effect in 1954?

A. I believe that it did.

Q. It was passed in 1953, advising people that by May 1, 1954 they would have to have a license?

A. I believe so.

Mr. Swanstrom: That is all. I make a motion
333 that all of this testimony with reference to valuation may be stricken from the record, and the jury advised not to consider it at all. That is all, Mr. Coffman.

The Court: Motion denied. Have you any redirect?

Mr. Ashenden: No. Thank you, Mr. Coffman.

(Witness excused.)

Mr. Ashenden: I will call Mr. Hartenfeld.

The Court: Mr. Ashenden, is this your last witness?

Mr. Ashenden: No, there is one more this afternoon at 2:00 o'clock.

The Court: I am just inquiring about progress.

Mr. Ashenden: By the way, if the Court please, our other witness is an expert, and I am wondering if we commenced with Mr. Hartenfeld, we could interrupt his testimony.

Mr. Swanstrom: No objection. Let us understand, so I can plan, because I have two or three witnesses in rebuttal. They will be short. Do you expect to consume the day?

334 Mr. Ashenden: No, we will finish by 3:00 o'clock.

Mr. Swanstrom: Finish by 3:00.

The Court: All right.

Mr. Ashenden: Depending upon Mr. Swanstrom's cross-examination.

LEONARD R. HARTENFELD, called as a witness on the part of the defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Ashenden.

Q. State your name, please.

A. Leonard R. Hartenfeld.

Q. Where do you live?

A. 4970 Marine Drive, Chicago, Illinois.

Q. What is your business or occupation?

A. I am an attorney. At the present moment I am engaged in other business.

Q. Are you licensed to practice in Illinois?

A. Yes, sir. Since 1936.

Q. Now, as an attorney, will you state what your experience has been, sir?

A. Well, I have specialized in aviation, beginning in 1942.

335 Q. And have you served on any committees in connection with your specialty?

A. Yes, sir. I have been on the President's Air Policy Commission in 1948 as—

Q. I think we will get to that later. Are you at present a member of the Chicago Bar Association?

A. Yes.

Q. In connection with that, are you on any committee?

A. Yes, sir, I am on the Aviation Committee of the Bar Association in Chicago here.

Q. Did you have any position with any governmental agency?

A. Yes, I became an attorney in the Bureau of Aeronautics in the Navy Department in Washington, D. C.

Q. When was that?

A. In the early part of 1942.

Q. How long did you keep in that position?

A. Until the end of the war, sometime around October 1945.

Q. What rank did you attain?

A. Lieutenant, Senior Grade.

Q. And in 1945, were you released then from active duty?

336 A. Yes.

Q. During the course of time you were with the Navy, what were your duties with the Bureau of Aeronautics?

A. There were several attorneys like myself in the Bureau of Aeronautics who traveled extensively for the Government, leasing and acquiring airports which were used by the Navy, acquiring that land and converting it, which was subsequently converted into airports; and we also did a lot of work in Washington in connection with Naval and Army and CAA matters that pertained to aviation.

Q. Did you have any particular knowledge of the Arlington Field here?

A. I don't recall any.

Q. As of that time that you were with the Navy?

A. No, I don't recall anything about Arlington?

Mr. Swanstrom: Your Honor, I think he ought to at this time tell us whether he is trying to qualify this witness as an expert or a factual witness. If it is not as an expert, why, there is no purpose of going into all of this man's history.

337 Mr. Ashenden: It is both, if the Court please.

Mr. Swanstrom: I think you ought to advise us if you going to qualify him as an expert.

Mr. Ashenden: I intend to.

The Court: I thought it was understood that he was going to be one of the experts.

Mr. Ashenden: That is correct.

The Court: I don't know, but maybe some factual, too; but I understood it was expert. That is what was stated yesterday.

Mr. Ashenden: That is true. I am trying to follow this chronologically. I think it makes for better examination if I do.

The Court: This man is to be called both as an expert because of his professional training, and as a factual witness who had something to do with and is interested in the case.

Mr. Ashenden: That is exactly correct.

The Court: All right. Proceed.

338 By Mr. Ashenden:

Q. Let us get back to the last question, particularly Arlington. Do you remember anything particularly about that, while you were in the Navy?

A. I don't recall anything about Arlington until after the war, when the Navy offered the field for lease on competitive bids, which I was handling, and the attorneys in the Bureau of Aeronautics who worked with me were handling collectively about a thousand or two thousand airports all over the country. At that time I was just one of those several thousand.

Q. After you were released to inactive service in 1945, what type of work did you do then?

A. I opened my own law office in Washington, D. C., and practiced law, specializing in aviation law.

Q. Did you work for any particular departments, associations, or groups?

A. Well, I didn't work — their clients, if that is what you mean.

Q. Well, I am sorry. That is what I meant.

A. I had a private office. I represented at one
339 time 42 departments of aeronautics of 42 states in aviation matters in Washington. Included among them was the State of Illinois.

Q. What type of work did you do in that connection?

A. At that time the States and the Federal Government were having a great many conferences in connection with the drafting of legislation, and also regulations of the Civil Aeronautics Administration pertaining to private flying, public flying, commercial flying, such as undertaken at O'Hare Field today, for example; and I participated in those meetings with various Government officials and representatives of the States in connection with the drafting of these various statutes and also regulations.

In addition, there was a big federal aid program at the time, which was pending, for the federal grant to states and municipalities for the construction of airports by municipalities and states; and I represented the states on those matters.

Q. You mean cities, villages and the states?

A. Yes.

340 Q. Were there any commissions that you served on during this period?

A. Yes. Approximately in 1948 the President appointed a commission called the President's Air Policy Commission, for the purpose of reviewing completely the aviation picture in the United States, both from a civilian point of view and from the point of view of the national defense.

At that time the aircraft factories were on the verge of bankruptcy throughout the country. The war had ended. Aviation was very low, and the atomic bomb was coming into the picture, and there were a lot of problems in aviation.

This commission was a five-man commission, headed up by Mr. Finletter who subsequently became Secretary of the Air Force; and the purpose of the commission was to explore every possible phase of aviation.

Q. How many people were on the staff of this commission, if you recall?

A. There were approximately 50 people, counting the secretaries, the girls who did typing, and so forth.

341 Q. What was your particular duty?

A. I was special consultant on aviation matters pertaining to airports. There were approximately six other consultants to the commission, who were consultants on other phases of this report.

Q. Who were you answerable to as a consultant?

A. The chairman of the committee, or his executive director, as I recall.

Q. How long did you serve with this commission?

A. This was a temporary commission, appointed for a period of roughly six to nine months. I have forgotten the exact time it lasted.

Q. What was the scope of its inquiry and report?

A. It reviewed completely the complete aviation picture in the national defense, and from the commercial and civilian point of view, and consummated a report which was sent to the President, which subsequently was approved by Congress, and was the backbone or the starting point of most of the post-war legislation affecting aviation, both from a national defense point of view and civilian.

Q. Was this report subsequently approved by the Senate or by Congress?

A. Yes, Congress approved it in substance by
342 various acts of Congress, and appropriated billions of dollars in connection with a program that came out of this report.

Q. In connection with this report, did you have anything to do with any particular section of the report?

A. Yes, I had to do with the airport section for civilian flying, the civilian airport section.

Q. In connection with that, did you have occasion to write any portion of the report?

A. Yes. I wrote that portion of the report. We also had many meetings with all the airport operators in the country or their representatives in Washington, and went through the complete airport picture at that time as it affected private flying particularly.

Q. Did you ever work in conjunction with any of the members of Congress on matters connected with aviation?

A. Yes, Senator Bryan McMahon of Connecticut asked me to draft a bill which was called the Surplus Airport Bill which he introduced in Congress, and which was subsequently enacted by Congress, after meeting with the War Assets Administration, Civil Aeronautics Ad-
343 ministration, the Air Force Navy, and all other agencies pertaining to aviation and airports.

Q. Was this a bill subsequently enacted into law?

A. Yes, sir.

Q. What did the Act provide in substance?

A. The Act provided that hundreds of airports which were built by the United States Government during the war could be donated by the Armed Forces to municipalities, cities, villages, states, and any public authority, for use by them for commercial aviation purposes during peace-time, with provision for recapture by the Federal Government in case of national emergency upon certain conditions. I don't recall the exact details of the statute; I haven't read it for some time.

Q. Do you know how many airports were transferred from the Government, either the Army or Navy, to municipalities under this Act?

A. I am certain there were at least 200, maybe a lot more than that, throughout the country. I know definitely that O'Hare Field here in Chicago was transferred to

Chicago under that statute, and is subject to that statute.

Q. When you say subject to that statute, do you
344 know of your own knowledge whether or not —

Mr. Swanstrom: Object to that, your Honor. It is utterly immaterial, just encumbering the record.

Mr. Ashenden: There is one important point that I suggest is material here.

The Court: You are asking him, "Do you know of your own knowledge?" You are asking him about a statute, aren't you?

Mr. Ashenden: No. On a particular — with reference to O'Hare Field, does he know of his own knowledge.

The Court: Pertaining to his knowledge of O'Hare Field, as to whether it comes under this statute or not?

Mr. Ashenden: Yes.

Mr. Swanstrom: What is the materiality of coming under this statute?

Mr. Ashenden: I intend to show that.

The Court: This is going into his qualifications and general knowledge. It is not harmful. He may answer.

By Mr. Ashenden:

Q. Will you state then?

345 A. Yes, O'Hare Field definitely comes within this statute. It was transferred to the City of Chicago pursuant to the provisions of the statute, and is subject to the same recapture clauses stated in this statute, as are all these other hundreds of airports throughout the country.

The Court: You are now referring to those that went to individuals, were sold to individuals, and were turned over to municipalities?

The Witness: Not individuals, your Honor. Under this statute only public agencies can receive them.

The Court: All right. So, then, we are now just talking about public agencies?

The Witness: Yes, cities, states, and so forth, and counties, yes, sir.

By Mr. Ashenden:

Q. In the course of any of your activities, did you have anything to do with any of the arrangements that were made in connection with O'Hare Field and its acquisition by the City of Chicago?

A. While representing the State of Illinois in Washington, in connection with the federal aid program,
346 the State of Illinois received quite a large sum, running into millions, from the Federal Government for the construction of airports in the United States — I mean in Illinois — and part of the appropriation, of those appropriations, went to O'Hare Field. In that connection I became quite familiar with the development of O'Hare Field.

Q. Do you know of your own knowledge how much money the City of Chicago has spent to date on O'Hare Field?

A. At least $10,000,000.

Mr. Swanstrom: Object to that, your Honor. The people can read these things in the newspapers.

The Court: Objection sustained.

By Mr. Ashenden:

Q. Now, in addition to your activities as an attorney, did you engage in any other businesses when you were in Washington, in the field of aviation?

A. Yes, sir.

Q. Tell us what they were.

A. I was president of a company called Public Air-
port Service Company. It was a small company, com-
347 prised of myself and four or five airport engineers.

Q. What were the functions of this company?

A. To advise municipalities and private operators on how to operate and maintain their airports.

Q. In connection with this, were any reports written?

A. Yes, sir.

Q. What was the nature of the reports?

A. These were studies that were made by our company in which we advised the cities what steps to take in connection with the operation and maintenance of their airports. I wrote a section of those reports, which had to do with the business operation as distinguished from the engineering phases.

Q. Have you written any articles on the subject of aviation which have been published?

A. Yes, sir. Approximately 10 major articles in leading naval aviation magazines.

Q. Can you name any of the magazines?

A. Flying and Aviation Maintenance and Operation, Aviation Weekly, and there are a couple of others I do not now recall.

348 Mr. Ashenden: If the Court please, this may be a good breaking point. We are at the noon hour now.

The Court: I would like to go at 12:30. Couldn't you submit this gentleman to cross-examination?

Mr. Ashenden: On qualifications, yes.

The Court: Cross-examination as to what he has testified to.

Mr. Ashenden: I would be willing to do that at this point.

The Court: Do you have anything special further with this witness?

Mr. Ashenden: Yes, the factual relating to this particular airport.

The Court: Then I think you ought to go ahead.

Mr. Swanstrom: There is absolutely nothing for me to cross-examine on.

Mr. Ashenden: Well, except as to his qualifications.

Mr. Swanstrom: Qualifications as to what? As a lawyer or as a public official in Washington?

349 I have asked you to designate whether he is going to be an expert. I can't examine as to whether or not he is qualified as an expert to testify.

Mr. Ashenden: I will question him further then.

Mr. Swanstrom: I assume he is an expert lawyer for one thing. That I am not going to challenge.

The Court: Well, it is for the jury to decide how much of an expert he is. He has testified about his experience.

Mr. Swanstrom: But they have to know about what — as a fisherman, or a flier, or what?

The Court: He has told about writing in this field of aviation and aviation law.

Mr. Swanstrom: He may be pretty good in that field, but I don't see how it is applicable.

The Court: All right.

By Mr. Ashenden:

Q. Did you have any connection or anything to
350 do with the Illinois Aircraft Sales & Service Corporation?

A. Yes.

Q. When did you first become associated therewith?

A. When the corporation was formed in 1946.

Q. And how was it that the corporation was formed?

A. I met Morris Fishman and Walter Rogers at that time, and at the same time the Navy was advertising on a bid basis for the leasing of this field. We formed a company for the purpose of bidding on the field.

Q. Who were the active people in this corporation?

A. Morris Fishman was the president. He is now in California. Walter Rogers was vice-president. I was either secretary or vice-president. I believe I was vice-president,

also an attorney. All of us were on the board of directors and stockholders, and there were others, too.

Q. Who were the others?

A. Louis Mantynband and Irving Richmond.

Q. In connection with the competitive bids that were let out by the Navy for this lease, what was in that bid, if you recall?

A. It was an advertisement that went out to all
351 the operators in this area, to newspapers, and everybody in the Midwest knew about it. It was being advertised.

Mr. Swanstrom: Object, your Honor. This is secondary evidence.

The Witness: Personal knowledge.

Mr. Swanstrom: Violation of the best evidence rule. If of any importance, let us produce the advertisement; otherwise, desist from this line of questioning.

The Court: What was in the advertising is not in issue. It is only as to whether or not they did advertise it. He may answer.

Mr. Swanstrom: I have no objection to that, the mere fact of advertising. I have no objection to his testifying to that.

By Mr. Ashenden:

Q. Now, was this bid accepted before or after a lease was prepared? Can you tell us about the negotiations surrounding the bidding and the lease?

A. We were notified by the Navy that we were the highest bidder, and were requested to come to Wash-
352 ington to sign the formal document, the lease that was eventually signed by us.

Q. Who drafted the lease?

A. It was all drafted in Washington by the Bureau of Yards and Docks of the Navy Department when we arrived there.

Q. The effective date of this lease I believe was May 2, 1947. That is when it was commenced, is that right?

Mr. Swanstrom: That is right.

Mr. Ashenden: May I take a look at the lease?

Mr. Swanstrom: Yes.

By Mr. Ashenden:

Q. Now, Mr. Hartenfeld, I show you Plaintiff's Exhibit 1 for identification, the lease involved in this case. As an expert in aviation law, I am going to ask you to give your determination as to the effect of the cancellation clause in this lease.

Mr. Swanstrom: Oh, I object to that, your Honor. I have never heard such a question. It is hard to point out how it is not objectionable. The man is asked as an expert in aviation to interpret a lease.

353 Mr. Ashenden: We are doing only what has been done by two real estate people who have talked about their interpretation of the lease. I think we are entitled to do the same thing.

Mr. Swanstrom: It is quite different.

The Court: He is only asking for his opinion. He may state his opinion. I think sufficient qualifications have been testified to to allow him to interpret it. I believe counsel is right; I believe there were at least two real estate men who interpreted it; and I think this man may do so.

He may answer.

By the Witness:

A. Well, in construing a lease, it is a fundamental proposition of law that we have to try to obtain the intent of the parties from the wording of the lease; and the second proposition is that a lease between a private company, such as the Illinois Aircraft, and the Government, is the same as a lease between two private individuals.

I don't think there is any doubt that the Government
354 meant that and agreed to that proposition.

From the lease itself, and we also must construe the lease as a whole, you can't pick out just one sentence or one paragraph and say that this particular set of words means anything at all without construing the entire document together.

Now, as we read this lease and look at the preamble of the lease, we see right in the beginning part of the second preamble, the lease states:

"Whereas, because of its strategic value, it is considered essential that the said airfield and the facilities thereon comprised in said United States air flying field be retained in a stand-by status for post-war use in connection with naval aviation activities."

Now, we note that it says "in connection with naval aviation activities," and it is to be kept in a stand-by status only for that particular purpose.

Incidentally, and this is very important because I can personally testify of my own knowledge, that this
355 was the pattern that the Navy and Air Force and Army all used at the end of the war. Congress had cut their appropriations to nothing after the war was over. They had these fields all over the country, literally thousands of them. They did not have the appropriations to support these fields. They did not want to dispose of them as surplus property, which meant that they would get into the hands of non-military people; and the only way they could reserve the right to study these fields and determine if they ever needed them again, was to execute leases of this character.

The Court: You mean by that they did not want to sell it outright so they would not have a claim and could

not use it in case of emergency without going through condemnation proceedings and all of that?

The Witness: That is correct, your Honor.

By the Witness:

A. (Continuing) The big problem in the minds of all the aviation experts of the Navy and Air Force at
356 that time is, "Where are the aircraft going?" The jet had not been developed yet. Nobody knew what the next step was in aviation. Until the matter was decided as to where is aircraft going, they decided to hold these fields in a stand-by status instead of declaring them surplus; and that is the reason why this clause is in the lease; and it is clearly in the lease for the reason that the Navy —

Mr. Swanstrom: Are we going to have a legal discussion, your Honor, or just his conclusion, his opinion?

The Court: That is what it is. It is his opinion. That is all it is.

Mr. Swanstrom: It is not his opinion. He is making a lecture. Are you now reading from the preamble, not from the body of the lease?

The Witness: I said I was reading the preamble, yes. It states:

"Whereas, because of its strategic value, it is considered essential that said airfield and the facilities thereon comprising the said United States naval out-
357 lying airfield be retained in a stand-by status for post-war use in connection with naval aviation activities."

By the Witness:

A. (Continuing) Now, the big point is that the wording of the lease points the whole lease into naval aviation activities; and the position of our company is that this lease can be cancelled only for naval aviation activities.

There are in evidence in this proceeding already letters from the Navy, stating that they no longer had any use for the field, and the reason for that is because naval aviation has grown so large in the jet type of operation that they could not use this particular field.

By Mr. Ashenden:

Q. Is there any such clause in the lease there that you have reference to?

A. Yes.

"Whereas the use of the airfield and facilities by the lessee for such purposes will in no wise be detrimen-
358 tal to the present activities of the Navy Department"—

There again is the comment regarding the Navy. The only thing I want to have in mind, at the time the lease was drafted, was the Navy, obviously, from the language of this lease.

We go into the body of the lease, and necessarily the preamble must be construed with the body of the lease itself in determining what the entire meaning of the lease is.

There are many other statements in here about the Navy, all the way through, which leads to the inevitable conclusion, in our opinion, that this lease can be cancelled only for naval aviation purposes.

Now, the cancellation clause is Clause 14, which has been read to the jury on very many occasions, incidentally also refers to the Secretary of the Navy as the one who shall do the various acts leading up to a cancellation; and, secondly, it must be construed with the entire language of the lease, including all the preambles which we have read, and all the other language throughout this
359 lease, they talked about the Navy Department; and, therefore, it must mean that it can be cancelled only in case of naval aviation purposes requiring the field.

Now, following along the Navy language, the whole thing about maintenance, operation, the use of the field, and so forth, subject to approval of the Navy—all the way through this lease the word "Navy" is used. It is the only branch of the Service that is mentioned.

By Mr. Ashenden:

Q. Is there any other clause in the lease that you have reference to in connection with this matter?

A. Yes, sir. The jury has heard that, or at least there have been great inferences made by the Government, that we did not have the right to operate a trailer park or barracks out there under this lease.

I would like to mention two things. The lease specifically say we can use it as an airport and for such other purposes as may be necessary or incidental thereto. Before we built the barracks conversion, put in partitions and so forth, and before we built the trailer park, we 360 were advised by the Navy that we were conforming to the lease.

Mr. Swanstrom: I object to this as hearsay.

The Witness: This is not hearsay. This is personal knowledge of myself.

Mr. Swanstrom: Oh, this is the most unfair testimony I have ever heard.

The Court: Now, wait a minute, counsel. That is an improper remark for you to make in the presence of the jury.

Mr. Swanstrom: You know that is hearsay.

The Court: Now, just a minute counsel. I am running the court. Let's get that straight. And I am telling you that that is not a fair statement to make in the presence of the jury.

Mr. Swanstrom: I apologize but renew my objection.

The Court: Just a minute. I am trying to rule, and I

say that it is not an unfair statement for the witness to make. Now, what the jury thinks of it, that is
361 their opinion; but he has a right to state what he did when he was negotiating this lease. Proceed with your evidence.

By the Witness:

A. (Continuing) In this connection the Navy, both before and after the facilities were built there, were out there continuously, about every three months of the entire seven and one-half years that we were in possession. They must have seen the trailer park and barracks hundreds of times, and never once did they object to the construction of those facilities.

The Court: The Government has full right of cross-examination of this witness on these statements he has made, and has full right to present any rebuttal evidence to it.

By Mr. Ashenden:

Q. Now, with reference to paragraph No. 8, in connection with this lease and this matter, would you state your opinion as to the meaning of that clause? Read it, and state it.

A. Paragraph 8 of the lease provides that:
362 "The Government at its option and discretion reserves the right to use the landing area in a manner that will not interfere with the operations of the lessee, except that extra use thereof may be made by the Government not to exceed 50 per cent of the landing area capacity by making compensation to the lessee therefor."

Q. I think there was either reference to this by one of the witnesses for the Government, one of the appraisers, concerning this clause. Either not all of it was read, and there was an opinion given by the expert as to his meaning of this clause.

Mr. Swanstrom: Oh, I want to correct that statement. My experts, the Government's experts, did not interpret this lease. They merely said they had read the lease, and these provisions would cause that fictional purchaser in the marketplace to beware; and it was an impediment against the sale of the lease. This is an entirely different proposition, putting a lawyer, an interested lawyer,
363 on the stand to interpret this lease to his benefit, it would mean that I should call in experts from the Bar, which I am not going to do, to interpret this lease.

Mr. Ashenden: Object, if the Court please, to the comment of counsel.

The Court: He has a right to make his comments. I don't agree with him. I heard the testimony of these other men, and they said they took that into consideration. They had to interpret it, if they took it into consideration in giving their testimony; and this witness has a right to interpret according to what he conceives. If there is any question on it, you can call the other witnesses back, and ask them how they interpreted it, because they did say they interpreted it. All right. Proceed.

By the Witness:

A. This paragraph that I just read definitely does not decrease the value of the leasehold; actually, it
364 increases it tremendously, because it provides that if the Government wishes to use the field, the landing area we are now talking about, they shall be limited to using it up to 50 per cent of capacity, which is ample to take care of any type of private flying out there; they shall not interfere with the lessee's operations, and they shall do so by making compensation to the lessee therefor. In other words, the Government would pay us for usng that field.

Now, that is part of the entire post-war setup. This was done as part of the incentive for the operators to

enter into leases throughout the country to preserve and maintain them for the Navy when the Navy was in a stand-by status on these fields.

By Mr. Ashenden:

Q. Is there anything in addition to what you have already stated about this lease that is pertinent to this particular question?

A. I think that there are many, many. I could spend a great deal of time, which I don't think is appropriate to do, to point out why this lease in my opinion could
365 be cancelled only for naval aviation purposes; but throughout this lease, practically every sentence in the lease must be construed that the parties had in mind only one cancellation provision; and that is cancelling it for naval aviation purposes only, aside from the other phase of the cancellation, which is if we do not maintain or operate the field properly, but that, of course, is not an issue in this case. Everyone agrees that we operated it all right.

Q. Do you know of your own knowledge, Mr. Hartenfeld, whether there was a flying license to operate the airport facilities obtained in connection with Illinois Aircraft?

A. Yes. Every qualified flying school that is operated under the GI program must qualify with the State, and must have such a license before we could get qualification with the Veterans Administration to teach GI flying.

Q. Now, apart from the lease, can you tell us what happened generally in the private aviation business from the standpoint of aircraft sales and other types of flight income incidental thereto in the Chicago landing area beginning in 1954?

A. Beginning in 1954 the older veterans of the
366 Second World War had already completed their flight time under the old GI Bill of Rights, so-called, for

World War II veterans. They had become pretty good pilots by then under the Government flying program; they had increased their earnings in their private business, so that they now had money to proceed with aviation on their own. In other words, they could rent planes and they could buy airplanes, and this had a tremendous effect upon the development of civil aviation. In fact, we are talking about private flying in the Chicago metropolitan area beginning in 1954.

In addition there was another factor, and that is the Korean veterans were just beginning to come back and were becoming eligible for the Korean flying training program under the Veterans Administration Korean Bill.

Q. When did most of the Korean veterans start to make use of their eligibility?

A. Just about in 1954 and through rapid strides in 1955.

And incidentally, on that same question, if I may add, the aircraft sales, of course, just soared from '54, '55, '56 and '57, as a result of the tremendous increase in private flying.

Q. What can you say with respect to the flight operations during the time the Illinois Aircraft Sales & Service Company operated on this lease from 1947 onward? What was the condition, what was the operation of the flying, and the other essential operations in connection with that?

A. We took great pride in believing that we had probably the largest private flight training school, at least in Illinois, and probably in the United States. We were very proud of our flying school. We did a great job; we turned a lot of students out who became subsequently airline pilots; a lot of them fought in the Korean War who were our graduates during this early period of 1947 and 1948; and we did the largest volume clearly in the Chicago metropolitan area in flight instruction.

Q. What about comparing GI flight from the Second World War with non-veteran flying?

A. During this time beginning in 1947, you mean?

Q. Yes.

A. At this period of time most, I would say three-
368 quarters of the flying that we did was veteran flying, and maybe a fourth was non-veteran type of flying.

Q. What other types of activities were there that were income-producing during this whole seven-and-one-half-year period?

A. We had a lot of tie-down hangar space, Aircraft Sales, and tie-down hangar rentals, of course, as a result of that; and this flight income that we mentioned. We had all the phases that make up a going concern on an aircraft operation. It was tops in the city.

Q. Sales of gas and oil, were they included?

A. Yes, we certainly had that.

Q. Maintenance for airplanes?

A. Yes. We had a shop which did considerable business.

Q. Now, Mr. Hartenfeld, are you familiar with the books and records of this corporation? By that I mean, the financial books and records.

A. Well, each year of the business I was given an audited copy of the records, prepared by our accountant, and I have seen the records throughout the operation.

369 Q. Have you had occasion to study the records recently?

A. Yes, sir.

Q. In connection with that study, what can you tell us were the gross income figures for this flight operation and the other operations, breaking this down into the various categories of income?

A. I have the figures for the fiscal years 1952 and 1953, which were obtained—this is a handwritten memorandum I took from our audited books, given to me by our auditor.

Q. You prepared it yourself?

A. I prepared this off of the auditor's statement, yes, sir. Of course, I can't remember all this information, so I am using it to refresh my memory.

Q. All right.

A. 1952; Flight income gross, $152,484; shop income gross, $5,484; barracks income gross, $20,602.

Q. Maybe you better slow down, so they can get it. Repeat those figures again, start again, so they can make notes.

A. Flight income gross, $152,484; shop income 370 gross, $5,484; barracks income gross, $20,602.

Trailer park income gross $26,710; camp equipment and sales of airplanes which were used by the company for its own flight instruction, $850.

Q. What year was this?

A. This was 1952 fiscal year.

Q. All right. What other records do you have?

A. Hangar and tie-down rentals $6,276; gas and oil sales gross, $2,756; sundry income, $1,447. Those are the 1952 figures.

The Court: Do you have a total on it?

The Witness: No, I am sorry, your Honor.

The Court: We are going to recess to 2:30, and we will proceed further.

(Whereupon a recess was taken until 2:30 o'clock P. M. of this day, April 11, 1957.)

371 • • (Caption—Civil Action No. 54 C 1468) • •

Before Judge Perry and a Jury

April 11, 1957,
2:30 o'clock P. M.

Trial resumed pursuant to recess.

Present:
Same as before.

Mr. Swanstrom: Judge, by inadvertence these two exhibits were received but they are marked for identification only, and I think counsel has one the same way.

Mr. Ashenden: I will get them together.

The Court: If the record shows they are admitted, they will be admitted even if they are not marked.

Mr. Ashenden: The change in procedure I anticipated this morning has occurred. I wonder if we can withdraw Mr. Hartenfeld?

The Court: You may withdraw the witness now,
372 and full right of cross-examination of this witness will be preserved, and further examination.

(Witness Leonard R. Hartenfeld withdrawn from the witness stand.)

RICHARD L. NELSON, called as a witness on the part of the defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Ashenden.

Q. Will you state your name, please, sir?
A. Richard L. Nelson.
Q. Where do you live?
A. I live at 888 Sheridan Road, Glencoe, Illinois.

Q. What is your business or occupation, Mr. Nelson?

A. I am a real estate appraiser and analyst.

Q. How long have you been so engaged?

A. For about 22 years.

Q. Are you associated with any business or firm?

A. Yes. I am the president of Real Estate Research Corporation, at 73 West Monroe Street, in Chicago.

Q. Will you state some of your qualifications and background in this field, please?

373 A. Well, my first work in the field was as economic adviser to the head of the low cost housing division of the FHA, starting in 1935, in Washington; and I was a trouble-shooter and appraiser for the Federal Government.

In 1936 I was an appraiser and real estate analyst in St. Louis.

Since 1937 I have been in the Real Estate Research Corporation of Chicago, and I have been in charge of its operation since 1942.

I have made more than 7,000 appraisals in my business career, and most of them, I would say, have been in the general Chicago area.

Q. Let me interrupt right there. On this appraisal question, what types of property have you appraised?

A. I would say just about every type. I have appraised apartment buildings, office buildings, hotels, vacant land, houses. Recently I have appraised an atomic energy plant and a dog kennel. We really get a great variety of types of things to appraise.

Q. Have you sold any leasehold interests?

A. A great many leasehold interests.

374 Q. Continue where you were going before I interrupted you.

A. I am a member of the American Institute of Real Estate Appraisers; member of the Society of Residen-

tial Appraisers; member of the American Institute of Real Estate Management; member of the Society of Real Estate Counselors; member of the Chicago Real Estate Board and the National Association of Real Estate Boards.

Q. Have you ever served in any official capacity in connection with any of those organizations?

A. I have served on a great many committees. I am a member of the Research Committee, I believe, right now for the Appraisal Institute, and also for the Management Institute. I have been an associate editor of several technical journals, including the Journal of Real Estate Management, and the Appraisal Journal.

Q. You have been employed, have you, by the Illinois Aircraft Corporation, to conduct a certain phase of the appraisal in this case, isn't that true, sir?

A. Yes, I have.

Q. In connection with that, have you worked in association with anyone else?

A. Yes. I have worked with several of my associates, and particularly Mr. Joseph West, who is executive vice-president of our company and is an accountant and appraiser.

Q. Now, have you seen the area that is in question, and particularly what we have referred to throughout this trial as the Arlington Field, or the location in question with this trial is concerned with? Have you visited that?

A. Yes, I am familiar with the area for many years. I have made many appraisals in this area. I made a study of the Rolling Meadows Development for the City of Arlington, I think in 1953.

Q. That is a housing development?

A. That is a large subdivision.

Q. Is it a residential subdivision?

A. It is a subdivision, a large subdivision. More recently I appraised the subject property, as I recall on the southeast corner of Central and Wilkie, or approximately on the corner; and I appraised the northwest corner of Central and Wilkie, oh, about two
376 years ago; and I also analyzed the new shopping center at the corner of Wilkie and Campbell, a very short distance from this property, about two and one-half years ago. I also made many other appraisals in this area.

Q. More particularly now, have you seen and appraised the present property—not appraised—have you examined the property in particular?

A. Yes, sir. I was in it three weeks ago last Sunday.

The Court: That is the property in question here, Arlington?

The Witness: Yes, your Honor. I was in it three weeks ago Sunday. That would be about the middle of March, about March 19th, I believe, and I was in it again today.

The Court: Today?

The Witness: Yes.

By Mr. Ashenden:

Q. Will you describe just briefly what you saw there on the Barracks Building, for example?

A. Well, the Barracks building is a frame building, two stories in height. It is in an H-shape. It has
377 two wings. Each wing is 127 feet 7½ inches long. It is about 28 feet 1½ inches wide. And these two wings are connected by the bar to the H. It is about 99 feet long and varies in width because there are several offsets, from a maximum of 35 feet to a minimum of 28.

Q. Now, will you state your particular qualifications on the subject of trailer park operations?

A. Well, I have studied a number of trailer park operations, and I have appraised them for the State's Attorney of the County of Cook and for other people. I am engaged in one now on Route 66 near LaGrange.

Q. Are you familiar with the operation of trailer parks in connection with or in conjunction with any particular military sites in the whole area?

A. Well, I had something to do with the operation of a somewhat similar to this, at the Glenview Naval Air Station. The Housing Authority of the County of Cook in about 1947 and continuing into 1948 converted five Barracks buildings there, very similar to these, into 144 apartments. They also established a trailer lot of about 36, if I remember, 36 trailers. This 378 was continuously operated for many years, and for all I know is still operated as a residential development and as a trailer park by the Cook County Housing Authority.

Q. What was the purpose in 1947 and 1948 for this type of thing?

A. There was a tremendous housing shortage then, and the Housing Authority was trying to create additional living units for people who were having a great deal of trouble finding rental quarters.

Q. Was this unit restricted, to your knowledge, to people that worked on the Base and were in the Service?

A. No. There was an agreement between the Housing Authority and the Navy that not more than 50 per cent of the rental units would be reserved for married naval personnel, and the rest were to be rented to the general public who were mostly in need of rental units.

Q. Mr. Nelson, have you had an opportunity to ex-

amine any of the reports, the financial reports of this Illinois Aircraft Sales & Service Company?

A. Yes. I have reviewed some of the audited reports by Mr. Max Bregman, CPA, the auditor of the
379 company.

Q. In connection with your examination, can you tell us what the gross income figures would be in connection with the operation of the trailer and the Barracks facilities?

Mr. Swanstrom: I will have to object to that, your Honor.

The Court: Read that again.

(Pending question read by the reporter.)

The Court: I think that this witness is called as an appraiser, isn't he? Why don't you get his appraisal; what he appraises this leasehold, the total leasehold to be; and then if counsel wishes to cross-examine on how he arrived and built up those figures, he has a right to do it. But it seems to me that you have laid the foundation by his experience. Ask him if he has appraised it; and if he has appraised the leasehold, let us find out what it is. I believe the objection should be sustained at the present time.

380 Mr. Ashenden: All right.

By Mr. Ashenden:

Q. I will ask you to assume, Mr. Nelson, that there was a lease under which the Illinois Aircraft Company was occupying this property; and that the lease could be revoked or cancelled only in the event the Government was to take this field for the purposes of naval aviation;

And further to assume that the taking by the Government for such purposes was extremely remote;

Assume further that there was in operation at this

field a typical trailer park, and in connection with that I show you now Plaintiff's Exhibit 3 portraying the site in question;

Assume that there was this trailer park with 119 trailers and an average monthly gross income of $22 per month per unit;

Assume further that the Barracks in the premises were divided into 32 apartments, categoried in the following income brackets: There were 12 at $40 per month;

one at $120 per month; 7 at $60 per month; 9 at
381 $75 per month; and 3 at $80 per month; that these apartments varied from 1½ to 2½-room units, and some of which were furnished; all of which had stoves, either electric or gas, a sink and a refrigerator and electrical and water facilities, hot water;

Assuming these facts, do you have an opinion as to the fair market value of the trailer park and the Barracks facility for the period from October 6, 1954 to May 2, 1957, a period of some two years and eight months? Do you have such an opinion?

A. Yes, sir, I do.

Q. What is that opinion?

Mr. Swanstrom: I object to that, your Honor, for several reasons. One reason is that the assumptions are based on facts that are not in evidence; they do not, furthermore, include all the assumptions that should be in this hypothetical question; and, thirdly, it is not competent to prove the various component values, values of various component parts of an enterprise.

The Government did not take any trailer busi-
382 ness. The Government took whatever possessory rights the defendant had in this land; and, therefore, this divisible question only runs afoul of the law, of the rule against summation.

The Court: Counsel, are you going to ask this witness as to his knowledge concerning the value of the leasehold so far as the airplane service is concerned?

Mr. Ashenden: No. I did not qualify him on that basis, if the Court please.

The Court: Well, objection noted and overruled. He may answer.

By the Witness:

A. It is my opinion that the value of this leasehold interest for the period that you mentioned is $42,000.

Mr. Swanstrom: Wait a minute. Let us have the answer responsive. He is asking about a trailer camp, and now he is talking about a leasehold interest.

Mr. Ashenden: He said that I mentioned. I am only talking about that portion.

383 The Court: It is understood. As I understand the witness, he is talking about the leasehold so far as the trailer camp part of it was concerned.

The Witness: Trailer camp and Barracks, your Honor.

The Court: And Barracks. Well, all right. So, the jury will understand that, and you are not including anything concerning the airfield.

The Witness: No, your Honor.

By Mr. Ashenden:

Q. What was your answer again?

A. $42,000.

Q. On what did you base this opinion?

A. I based my opinion on my familiarity with the area and my inspection of the property, my inspection of the original plans for these Barracks buildings, and on the hypothetical conditions that you told me about concerning the number of apartments, on the operation of a typical trailer camp, and I included in addition my knowledge of the audited reports for the company

and the income which was available from this leasehold interest.

384 The leasehold interest for the years, the last two years of 1953 and 1954, averaged a net income per year of $25,700.

The gross income was $51,500. The net income was $25,700.

I have projected an income for the remaining two years and eight months of this leasehold interest of a gross income of $50,000, and a net income of $25,000, which is 50 per cent expense factor and a 50 per cent net income factor.

This $25,000 I have assumed is an annuity, which would have a value as an annuity for two years and eight months, which would have a present value as of October 6, 1954, capitalized at 25 per cent interest.

The Court: 25 per cent?

The Witness: 25 per cent interest. This assumes that a purchase on that date would want 25 per cent return on his money.

The Court: I see. For the period of time that elapsed since that time?

The Witness: From October 6, 1954 to May 2,
385 1957, your Honor.

The Court: All right.

By the Witness:

A. (Continuing) This results in a total value for that income of $44,533.

I have further calculated that the cost of necessary restoration would be approximately $2,500, resulting in a total value of $42,033, and I have rounded it off at $42,000.

I have assumed in this that the field, and this property in particular, the Barracks and the trailer camp, could only be taken for naval aviation purposes, and

that such a taking was extremely remote; and I have also taken into account my experience as an appraiser.

Mr. Ashenden: Thank you very much. You may cross-examine.

Cross Examination by Mr. Swanstrom.

Q. Have you read the underlying lease that the defendant here, the Aircraft Company, has with the Government?

A. Yes, sir, I have.

386 Q. You did not find that there were any elements in the provisions of that lease that would cause a prospective customer any alarm?

Mr. Ashenden: Objected to, if the Court please.

The Court: No. Objection overruled. I think both sides are entitled to present their complete theory. On cross-examination he may.

By Mr. Swanstrom:

Q. You took the position then that the purchaser would not find anything in the lease that he was buying that might cause him any disturbance or alarm?

A. Well, there is a clause in the lease which allowed the cancellation under certain circumstances. I am an appraiser. I don't know what exactly those circumstances are. I understand that the attorneys in this case are at odds on this purpose.

Mr. Swanstrom: Never mind. Let us not have any more of the attorneys in this case.

The Court: Objection sustained. You can't repeat 387 what somebody else had told you. Just state your own opinion.

By Mr. Swanstrom:

Q. But you took this, when you appraised it, as being a lease that no purchaser would have the slightest hesitancy because of the fact that he might be disturbed in

his operation of a trailer camp or in the operation of the field?

A. I assumed that it was unlikely.

Q. Unlikely?

A. I did not finish my answer. I assumed that the—

Q. Maybe it is sufficient for me.

The Court: Let him finish his answer.

By the Witness:

A. (Continuing) That the field could only be taken for naval aviation purposes.

By Mr. Swanstrom:

Q. I am not interested in that. I asked you a question and you answered it. Will you stop now?

The Court: Just a minute, counsel. Let him finish his answer; and if it is not proper, you can move to strike it.

Mr. Swanstrom: Well, that doesn't—

The Court: But we can't both talk at once. Let 388 him finish.

By the Witness:

A. (Continuing) I used a 25 per cent capitalization rate, which in my opinion represents the risk represented by this, the extremely remote possibility which was given to me as an assumption.

By Mr. Swanstrom:

Q. Who gave you that assumption?

A. The attorney in this case.

Mr. Ashenden: In the question that was put.

Mr. Swanstrom: No, no. He made up his mind before he came here, or he is not much of an appraiser.

Mr. Ashenden: If the Court please—

The Court: Go ahead.

Mr. Swanstrom: Please, don't haggle with me.

The Court: Go ahead.

By Mr. Swanstrom:

Q. So then, now we have disposed of the purchaser,

he is not concerned at all, he is buying a first-class proposition?

A. 25 per cent is not a first-class rate. Don't 389 misunderstand me.

Q. Then, if it wasn't for the fact that the purchaser might be fearful of being disturbed, instead of 25 per cent, $42,000, that would be three times that much, 100 per cent?

A. I don't understand that question.

Q. You say that because you thought a purchaser might have some concern, you either made it 25 per cent of the whole, or you reduced it by 25 per cent—now, which was it?

A. I used a 25 per cent capitalization rate.

Q. I don't understand that.

A. Well, this means that a purchaser would pay an amount equivalent to getting his money back over the two years and eight months, and give him 25 per cent interest on his money during that period. Now, this 25 per cent interest is a high rate; it is a risk rate. If there were no cancellation clause whatsoever in the lease, I would have used a much lower rate, and it would have reflected a higher value for this annuity.

Mr. Swanstrom: I think I get a simmering of understanding.

The Court: Ask him if there had been no cancella- 390 tion clause, what he would have figured.

Mr. Swanstrom: Well, I am not interested in it.

The Court: All right.

Mr. Swanstrom: Because I think it is so, the assumption is so—oh, well.

By Mr. Swanstrom:

Q. You took some elements into consideration, your experience, and the fact that you have looked at the books?

A. Auditor's statements.

Q. Incidentally, they did not tell you what their net income was, did they?

A. I have seen the audited statements of the company.

Q. Do you know what their net income was—what was this, 1952?

A. I know the net income for the fiscal years ending in 1953 and 1954 from the operation of the trailer court and the Barracks averaged $25,700 per year.

Q. Did you verify that by seeing the copies of the income tax returns?

391 A. No. All I have seen is their audited statements by a certified public accountant.

Q. What was the last trailer camp that you appraised?

A. I am involved in one right now, on Route 66, near LaGrange.

Q. Did you take into consideration that this trailer camp, whether or not it had a license, a State license, to operate a trailer camp?

A. I don't know anything about the license.

Q. You don't know whether a trailer camp needs a license or not?

A. I don't know anything about that, no, sir.

Q. If a trailer camp of this kind needed a State license in order to operate, and it did not have one, assume that it didn't have one, would you change your valuation figures any?

Mr. Ashenden: Objected to, if the Court please.

The Court: I think he is entitled to ask him that. He may answer it, if he can.

By the Witness:

A. If the trailer camp was operating illegally,
392 it would change my opinion. It would be worth less.

By Mr. Swanstrom:

Q. If it was operating illegally, would it be worth anything?

A. Well, it would be worth something, yes, sir.

Q. Do you mean to say if a saloon, which requires a license, is operating without a license, that it is worth anything?

A. Well, this depends on the purchaser's estimate of how quickly he might be closed. I have appraised a great many slum buildings for the Chicago Land Clearance Commission—

Mr. Swanstrom: Oh, let us be responsive.

By the Witness:

A. (Continuing) Many of which were being operated—

Mr. Swanstrom: If the Court please, I need protection from the witness.

The Court: Just a minute, Mr. Witness. Just answer his questions. Just answer his questions. The answer may be stricken. It was not responsive.

Mr. Swanstrom: That is all.

The Court: Any redirect?

393 Mr. Ashenden: A couple of questions.

The Court: All right.

Redirect Examination by Mr. Ashenden.

Q. You would not consider it to be valueless if there was a chance of getting a license or becoming in compliance?

Mr. Swanstrom: Just a minute. I object to that. We are dealing in 1954, and this kind of assumption is just utterly—

The Court: You have gone sufficiently into that, counsel. Objection sustained.

By Mr. Ashenden:

Q. To make it exactly clear here on what basis you testified and gave your valuation, Mr. Nelson, you gave your valuation on the basis of some facts that I asked you to assume; is that correct, sir?

A. Yes, sir.

Q. If those facts were not all assumed, you would probably have a different valuation, wouldn't you?

A. Yes. If I had been given the assumption that the lease could be cancelled any time for any purpose by anybody, my answer would have been a substantially
394 lower figure.

Mr. Ashenden: All right. Thank you very much.

Recross Examination by Mr. Swanstrom.

Q. When you say a subtantially lower figure, if it could be cancelled on a 60-day notice, what would your figure be, as far as the trailer camp is concerned that you have testified to?

A. I haven't calculated that, but the owners were making net something better than $2,000 per month.

Q. You would say $4,000?

A. So that a purchaser would estimate how soon it was likely that such a lease would be cancelled. I have seen a great many leases with 60-day cancellation clauses.

Mr. Swanstrom: Let's be responsive, please.

Mr. Ashenden: I submit he is trying to answer the question.

Mr. Swanstrom: He has answered it to my satisfaction.

395 The Court: The last part may be stricken. The rest of it is responsive. The last statement about "I have seen a great many," will be stricken. The rest of it stands.

(Witness excused.)

LEONARD R. HARTENFELD, a witness on the part of defendants, having been heretofore duly sworn herein, resumed the stand and testified further as follows:

The Court: Let the record show this witness has resumed the stand.

Direct Examination (Cont'd) by Mr. Ashenden.

Q. I believe that you were giving us the figures for 1952, the gross figures, on the income from the various operations of this field.

A. Yes, sir.

Q. Did you complete the 1952?

A. Yes, I have completed the 1952. Do you want me to give the 1953 now?

Q. Yes, if you would.

396 A. Flight income gross for 1953, $120,524; shop income gross was $7,276; the Barracks income gross was $20,140; the trailer park income gross, $27,247; capital gains on sales of our own aircraft that we flew in training, $1,000; hangar and tie-down rentals, $5,001; the gas and oil sales gross were $3,633; sundry income was $2,707.

Q. Now, in your opinion, what was the greatest single asset of Illinois Aircraft Corporation in October of 1954?

A. Unquestionably our lease with the Navy, and the facilities which we were using under that lease.

Q. Well, why is that?

A. Because this lease gave us the opportunity of using an airport facility, which is unique in the Chicago metropolitan area, both by way of its characteristics, the physical attributes, such as the hangars and Barracks buildings, and the wide, beautiful approaches on the landing area, and also as to its location close to the Chicago metropolitan area, where people could come

out and fly very easily; and this last factor is one
397 of the great factors in income determinations at any private flying airport.

Q. We took a long bus ride—that is, we didn't, but the jury did—out to Arlington. Some of them are South Siders. Would you say that this field, as it is located, is farther out or closer, how does it compare locationwise to population centers?

A. This is considered to be close to population, and it isn't far to drive by car; but you have got to get out in the country in order to get clearance for landing and taking off for airports; and as airports go, this is one of the closest to Chicago.

Q. What about the proximity to commercial and military installations?

A. This happens to be a very important factor in the type of flying we were doing. We were engaged in a civilian plan, where you take a man who has never flown before, and teach him how to fly an airplane. If he gets caught in any traffic patterns or any patrol areas, such as between O'Hare and naval air stations, where they are using heavy military jets, he is petri-
fied when he gets up in the air, he can't fly, and he
398 has so much fear. There is also a danger of accidents. Now, our airport, the Arlington Airport, was so located it was outside of the approach areas and control areas of O'Hare Field and also the Naval Air Station at Glenview; and therefore had particularly good value as far as North Shore airports were concerned.

Q. Now, in your opinion, after 1952 was the skillful operation by the management a big factor, or what would you give that as a factor in the successful operation of this business?

A. I don't believe so. By 1952 we had the airport.

completely organized, and it was practically running by itself. The trailer park and the Barracks building required very little operational help. Mary Moser took care of the collection of rents, talking to tenants, and so forth. She was also able to take care of the flight records. We had a flight manager out there who took care of that type of thing; and actually the business had reached such a point of development that it was possible for the owners of the business to devote efforts elsewhere a great deal of the time.

399 Q. Now, from its inception in 1948, was there ever a termination or interruption for any reason whatever of the trailer park operation at this location?

A. No, sir. From 1947 until the condemnation proceeding was filed in this case, both the trailer park and the Barracks operated continuously without interruption at all.

Q. Did the operation of a trailer park or the Barracks ever result in the violation of any law?

A. Absolutely not.

Q. Did the Navy ever cancel or threaten to cancel the lease because of the installation of the trailer park and Barracks?

A. No, sir.

Q. Did they ever cancel or threaten to cancel the lease for the type of operation that was conducted in the trailer camp and Barracks?

A. No, sir.

Q. Were there any complaints by the Navy or anybody else, from the local public health board, or other authorities, in connection with this trailer park facility and the Barracks installation?

A. Yes, you might call them complaints. We had
400 a naval inspection—under the terms of our lease, the Navy had a right to inspect the facilities at any

time whatsoever, and tell us what they thought should be done to proper maintenance and repair, which was our obligation under the lease. Approximately every three months a Navy inspector would come out and look over the grounds completely, and take several hours to do so.

Now, frequently, within the seven and one-half years, he would find very small things to do, he would find very minor things to do, such as paint this wall or paint this house; once or twice they told us the Barracks building you saw when you were out there required complete painting, and we repainted the entire thing. Whenever they gave us any kind of suggestions, we did them.

The primary thing that caused trouble was the septic tank which provided the sewage treatment plant for the entire facility. We were operating under a sewage treatment plant that the Navy had originally built during the war. I understand the Navy had trouble with that plant; we certainly did during the life of our lease. At times that plant would clog up, and we had to
401 change the sand and gravel in the treatment plant, and this was done as soon as possible to do so whenever that occasion arose. However, this did result in complaints—I don't like to use the word "complaints," but I would like to rather say there was discussion by the Navy with us to cure that defect, and we spent a lot of money fixing that treatment plant during the life of the lease. But there was nothing to endanger health. The only problem that arose was an odor that arose occasionally from this thing when it broke down.

Q. Now, as a result of any of these complaints, either by the Navy or the public health people, was there ever an interruption of any of these income-producing operations, particularly the trailer operation and the Barracks operation, at this field?

A. Not one moment during the entire period we were there, seven and one-half years.

Q. Now, based upon your knowledge of this lease and the intentions of the parties as expressed therein, as understood by you, based upon your experience in the field of aviation and of your particular knowledge of the operations, the location, and facilities
402 of Arlington Field, do you have an opinion as to the fair market value of this leasehold on October 6, 1954, considering the balance of the term of two years and eight months from that date, considering also all phases of income-producing operation? Do you have such an opinion?

A. Yes.

Q. What is that opinion?

Mr. Swanstrom: Object to that. He is an interested party financially, and he has not shown the qualifications necessary. All these qualifications went to the lease or the technical aviation matters in Washington. No qualification for this at all.

The Court: Objection overruled. The jury will be instructed that a person may testify in a matter in which he is interested, and that the jury may take that into consideration. You may answer.

By Mr. Ashenden:

Q. What is your answer?

A. A minimum of $150,000.

403 Mr. Ashenden: You may cross-examine.

Cross Examination by Mr. Swanstrom.

Q. How many leases have you drawn or worked on in reference to the leasing of an airport?

A. In my lifetime, sir?

Q. Yes, in your lifetime.

A. I probably had to do with, oh, I would say, at least three or four thousand leases.

Q. In drafting them?

A. Yes, during the war.

Q. How many leases have you had anything to do with that carried the provisions similar to the provisions in this lease as to cancellation and as to use?

A. Well, I am not quite sure what you mean, Mr. Swanstrom. Will you tell me more specifically?

Q. Well, these leases that you talked about were rather formal matters during the war?

A. Yes.

Q. And this is a little special, and I thought we could put it in a different category; that is, where the Navy, or the Army, or the Government wanted the property in a stand-by condition on account of its strategic importance, and only leased it temporarily to keep the thing, to get some income out of it, and so forth. How many of those?

A. Probably—if I understand your question—let me try to answer this question, because we were talking about a legal subject, and you say what is a lease comparable to another lease, I am not quite sure.

Q. I don't want to embarrass you on that.

A. No, it is not embarrassing, but I am trying to understand the question.

Q. It is very difficult for me to frame the question, and I think I better withdraw it, because I think it would be easier for the Court and the jury.

A. If I understand it, I would be glad to answer.

Q. I want to clarify one thing. I think you didn't intentionally mean to say, or I misunderstood or misheard you, when you were discussing this forenoon the cancellation clause provision, which is paragraph 14,

I think you said that that clause also indicated that
405 the cancellation was for the Navy?

A. That is right.

Q. You did not mean that?

A. I said this clause had to be construed with the rest of the lease so that you came up with the legal result that the entire lease means that the lease can be cancelled only for naval aviation purposes.

Q. Will you point out specifically the language of paragraph 14 that substantiates that position?

A. Well, first of all—

Q. No, just the paragraph 14, the language.

A. One word that is particularly interesting there is "essential." It is used only twice in the lease, and in the second paragraph of the preamble the word also appears.

Q. No, I was going to get to the preamble afterwards.

A. Well, you want my construction of the paragraph.

Q. No, I don't.

A. I thought that is what you wanted.

Q. No, I don't. I just wanted to see what there was in paragraph 14 that made you say—which I
406 may have misunderstood; I thought you made a mistake on it—that it indicated that the lease could only be cancelled because the Navy wanted to use it.

A. I am trying to explain, sir. The word "essential" appears in paragraph 14. It must be construed together with another word "essential" which appears in the preamble of the lease. In the second paragraph of that preamble the word "essential" also appears, and the two are construed together to reach a result. I think we are arguing law here.

Q. We have done that all morning.

A. I guess we have.

Q. And now you have put yourself out to do that, and so you and I are going to do it.

A. I had to do that in order to explain our position.

Q. You did it because the word "essential" appears in the second "Whereas," and the word "essential" appears in paragraph 14?

A. I think it is very important; it is very important.

Q. What Federal case law have you to support
407 your position? That these Whereases, these recitals, these introductory clauses—the courts use all those words—are controlling in the lease where the body of the lease is not ambiguous in any form or in any part?

A. First of all, I think we have probably a dispute as to part of your question, but I will try to answer it this way. I think I have a brief over there that will take me a couple of minutes to find. If I can locate it, I will be glad to read it to you. May I leave the stand, your Honor?

The Court: Let counsel bring it over.

Mr. Ashenden: I will bring it over.

The Witness: If I can find the right brief; there are so many in the case. Well, this is not the right one.

The Court: You better get it.

The Witness: I am sorry to delay things, your Honor, but I want to answer his question.

By Mr. Swanstrom:

Q. Does your brief show any Federal cases?

A. Yes, I am sure we have all kinds of cases in here, if I can locate it, Mr. Swanstrom.

408 Q. I have three Federal cases here on the point that you may read, and then give your opinion.

The Witness: Do you want me to take time to look it up, your Honor?

The Court: He has asked you the question. It is all right with me. You answer it like you think it ought to be answered.

The Witness: That is Illinois law. I am sure the Federal law follows everybody else's law.

Mr. Swanstrom: Oh, no. Federal law has got three cases right on the point. If you haven't got them, we will produce them with our own witness.

The Witness: We have them, your Honor, but it is extremely unfair to expect to find them in this manner.

Mr. Swanstrom: I will give you time to find them. You can bring them in in the morning.

The Witness: Fine, if I can bring them in in the morning, I will be very glad to do that.

409 The Court: As to that question of what the law is, the Court will instruct the jury on the law, on both sides, so you can get away from that.

The Witness: That was my impression, your Honor; that is why I did not have the brief available at my fingertips here.

Mr. Swanstrom: Well, the witness has testified what this lease means.

The Court: The Court will instruct you, and the jury can hear the law, they will hear the evidence and hear the law, and they can make up their minds. I don't think we need to go too much into it.

Mr. Swanstrom: I don't think it is of any importance, but you were with the Government only two or three years, weren't you—two years?

The Witness: No, more than that.

By Mr. Swanstrom:

Q. You say you drew three or four thousand leases. There are not that many air stations in the world, 410 are there?

A. In the world, I am sure there are. I was with the Navy from 1942, the spring of 1942 until October of 1945, which is more than two years.

Secondly, when you are working up one field, even as small as Arlington, and you are on a lease basis, you may have as many as 50 different leases with farmers in making up parcels, so I am sure I have executed or drafted at least three or four thousand.

Q. What do you consider an aircraft?

A. An aircraft would be anything that flies except guided missiles, which I consider as not exactly an aircraft.

Q. A guided missile is propelled by itself, isn't it?

A. That is not customarily known as an aircraft.

Q. Well, a guided missile is a complete mechanism that propels itself when in the air, isn't that right?

A. But it doesn't carry anybody inside of it.

Q. No, that is right.

A. It propels itself in the air, that is right.

Q. Of course, it does not carry a man.

411 Mr. Swanstrom: He does not know anything about septic tanks.

Mr. Ashenden: Object to the comment, so the jury can hear, if the Court please.

Mr. Swanstrom: I merely meant this, that it wasn't sufficient for me to examine him on it. I don't think the jury heard it.

Mr. Ashenden: Well, I heard it.

By Mr. Swanstrom:

Q. Did you run your business out there on a fiscal year or a calendar year?

A. We ran on a fiscal year from April 30th to April 30th.

Q. As a year then 1952 would be from May 1, 1952 until you complete the cycle, which would be in 1953?

A. Yes.

Q. Now, did you total the figures that you gave for 1952 and 1953 during the lunch hour?

A. I am terribly sorry. I really forgot all about it. I'll take your mathematics.

Q. I am sorry, my mathematics is terrible. I found something like $216,000 for 1952. I don't know
412 what it is for 1953.

A. I am awfully sorry, Mr. Swanstrom. I really intended to, and I got part of it once and forgot about it.

The Court: Subject to correction, we will let that figure stand.

Mr. Swanstrom: I don't know what the other one is. The other one is practically the same, a little bit different.

By Mr. Swanstrom:

Q. You did not give us anything for the fiscal year 1953-1954.

A. No. I gave you for the fiscal years '52 and '53.

Q. That would be in 1954, wouldn't it? Nothing from May 1, 1954 to the end?

A. No, sir.

Q. Well, that is not important.

Now, you did not have any State license to operate this trailer camp? I think I asked you that the other day.

A. State license?

Q. Yes.

A. I don't believe we did, not on the trailer camp.

413 Q. Where did you get these figures from, from the same source, your appraiser?

A. These are the auditor's figures of our auditor who gives us annual statements.

Q. As far as you are concerned, you are not so sure?

A. These are accurate.

Q. These are accurate?

A. I did not personally add them up. I never was an accountant.

Q. Are these the figures which you used in your income tax returns?

A. Yes, definitely.

Q. You are sure?

A. Yes, sir.

Q. Have you ever paid dividends?

A. Dividends? You mean the corporation pay dividends?

A. I don't believe we did. We paid a liquidating dividend.

Q. Did you have any net income during any of these years to amount to anything, any year over $5,000?

A. The net before taxes and officers' salaries
414 we had. I have got those figures here. I cannot break it down into income tax returns figures because I did not think they were important in this case.

Q. Well, I have got the income tax, so we can do that.

A. Fine. If you have got them, I will take your word for them.

Q. We will put them into evidence, so we don't have to bother about it. Now, I think maybe we ought to talk a little about this lease. Have you got a copy of it there?

A. Yes, sir, I do.

Q. Did you give any value to the fact that in paragraph 1 the lease says it may be terminated by the Government "as hereinafter provided"?

A. Where is this, sir?

Q. Paragraph 1, reading from the body of the lease, the operating part of the lease.

A. You mean after the "Now, therefore"?

Q. No, "to have and to hold the said demised premises."

A. Yes, sir, I have got it.

Q. Did you take that into consideration?

415 A. Why, of course.

Q. You did?

A. Why, of course, you have to construe the entire lease together.

Q. Now, did you take into consideration that the lease does not indicate or suggest anywhere, except if you want to drag in these Whereas clauses, that any particular branch of the Government would use the premises if the lease were cancelled?

A. Will you kindly state that question again?

Q. I will state it again. It wasn't clear probably. Aside from your bringing in the Whereas and recital clauses, is there any place in the lease that indicates that any particular branch of the Government would use the premises?

A. Yes, sir. Let us take paragraph 5, where we are talking about the Barracks building. It says on the top, page 5:

> "Provided, however, the Government reserves the right to repossess and take over this building in the event that it desires to do so for the purpose of reconverting the same into apartments for naval housing."

416 It does not talk about any other kind of housing. It says "naval housing."

Q. That is in reference merely to the Barracks, and we have proven part of the Barracks was given up later on. But is there any other place where it says that anybody except the Government is going to use these premises, any particular branch of the Government?

A. This paragraph I just read is very important, because the Barracks is a part of the whole lease, and you are construing the lease as a whole to get the intention of the parties. Now, if the parties, who included the Navy Department, who signed the lease, intended or had any idea at all of talking about the Army, they would have said Army housing as well as Navy housing, but they didn't. Nowhere in this lease is the word "Army" used.

Furthermore, Mr. Swanstrom, let me say this: In interpreting the lease it is very important to understand that this lease was executed in 1947 prior to the Unification Act that you read to the jury the other day.

Q. That is right.

A. Before the Unification Act the Army and 417 Navy were just like two different people; they hardly even talked to each other.

Now, we have to construe this lease in the light of what existed at the time the lease was executed to find the intention of the parties even though this is a Government lease, because the Government is in no different position than two private individuals negotiating together.

Q. Uncle Sam has to act through his agents, doesn't he?

A. Well, naturally.

Q. And the Congress had passed that Act that you referred to, that the Army and Navy before the coordination act was passed could exchange without consideration. Now, isn't is a fact, as far as that is concerned, paragraph 5 is practically out of this lease by reason of the amendment where the Government gave up any right in the Barracks building?

A. No, not at all. The Government did not give

up any right in the Barracks building. The Government merely included the Barracks building in this lease to a greater extent and made it subject to all the terms and conditions of the airport and the
418 rest of the facilities.

Q. You mean the modification agreement?

A. The modification agreement that was sought we can now use the Barracks completely.

Q. That is right.

A. And up to that point—

Q. That is all. You have answered the question. The modification agreement said, "You can use the Barracks; we don't want it."

A. And made part of the regular lease.

Q. So, when we come to the extension of the lease, we practically ignored paragraph 5. Now, Mr. Hartenfeld, I have asked you I think before: Is there any paragraph in the lease that says the revocation is dependent upon any particular branch of the Government using this field?

A. Now, Mr. Swanstrom, you know as a lawyer, what I am saying—

Mr. Swanstrom: If the Court please—

The Witness: Yes, of course there is.

The Court: Just answer the question, Mr. Witness.

The Witness: Yes.

The Court: What is the answer to the question?
419 The Witness: The answer is yes.

By Mr. Swanstrom:

Q. Yes? Very good. Point it out.

A. The entire lease read as a whole, as I explained this morning.

Q. That is not an answer to my question.

Mr. Hartenfeld, you and I are both lawyers.

A. That is right.

Q. For the purpose of this question, I am cross-examining.

A. That is correct.

Q. I am setting away those recitals because I don't consider them as important as you do, and my law may be stronger than yours. That is up to the Judge. So I am only asking you to point out in the body of the lease any provision that says that it cannot be cancelled except that a certain branch of the Government shall use the field?

A. Mr. Swanstrom, you are confusing the jury, I am sure, because the preamble under the law has to be construed with the body of the lease according to our 420 position on the law.

Q. Assuming that that is not the law, will you please answer my question?

A. Assuming that is not the law, I think there is ample language—

The Court: Wait a minute now. We don't want to get something that is not the law before the jury. Let us answer his question, answer his question directly: Is there any particular paragraph? That is what you want to know?

Mr. Swanstrom: That is right.

The Court: Is there any particular paragraph all by itself that does that?

The Witness: Your Honor, I referred before to the word essential in paragraph 14 of the lease which ties back into the preamble. It is our position that the body of the lease expresses an intention to incorporate the preamble into the body of the lease in order to understand the body of the lease.

By Mr. Swanstrom:

Q. We understand that is your position. Mine is
421 the opposite. So we will forget that for a moment.
Now, answer the question.

The Court: Now, your position is that you must read the lease altogether.

The Witness: That is correct.

The Court: Well, I will instruct the jury, as far as that is concerned, that that is the law, as far as that is concerned; but he is entitled to an answer to his question; is there any special particular paragraph where it sets it out by itself, or do you have to look to the whole lease and other parts conjoined together?

The Witness: Yes, your Honor; it is our position that we must look to the entire document.

The Court: Now, wait a minute. You are not answering my question. Counsel's question is: Is there any paragraph where it sets it out all by itself in one paragraph?

By Mr. Swanstrom:

Q. Or sentence?

422 A. There is a lot of language in the body of the lease which refers only to the Navy in such a manner that in my opinion it certainly means what our position is, construed together with the preamble.

Q. If you are in my position, Mr. Hartenfeld, and I am in yours here, wouldn't you behave the same under the circumstances? You would certainly demand that I answer that question yes or no, if I knew?

A. Is am trying to answer it.

Q. Yes, I know. If your know; if you don't, say, "I am sorry; I haven't read the lease carefully to know."

A. I have read this lease very carefully, and that is why I am trying to explain the lease.

Q. Yes or no? Is there a specific provision in the body of this lease?

The Court: All by itself, any one paragraph?

Mr. Swanstrom: Or a sentence, your Honor.

A. There is no paragraph, your Honor, in this
423 lease that says specifically that the Army cannot use the field. When I say specifically—

The Court: Or that the Navy has to use it only?

The Witness: That is correct.

The Court: All right.

By Mr. Swanstrom:

Q. Now, we did refer to paragraph 5, which says the Government reserves that right. Now, paragraph 7 refers to that you shall hold the Government harmless, does it, not the Navy?

A. That is right.

Q. And paragraph 8 reserves the right in the Government to 50 per cent of the landing field under the restriction; that is right, isn't it?

A Correct.

Q. And in paragraph 16 the Government reserves the right to keep certain equipment in there. Well, I think that is sufficient for that.

The Witness: If I may just finish my answer, your Honor.

Mr. Swanstrom: I have never been in this kind of a situation before.

Mr. Ashenden: Object to the comment of counsel,
424 if the Court please.

The Court: Go ahead. Ask your question.

Mr. Ashenden: I object to the comment.

The Court: Objection overruled.

Mr. Swanstrom: I think the witness and I understand each other. He never has either.

The Court: Now, come on, ask your question and let us go on.

By Mr. Swanstrom:

Q. Now, going back to these figures, did you take, do you have from your auditor, the figures for the fiscal year '53-54?

A. I have the fiscal 1954, yes, sir.

Q. Well, let us have those, then, too.

A. All right, sir. Flight income gross, $51,905; shop income gross, $6,566; Barracks income gross, $18,592; trailer court income gross, $35,963; capital gain on sales of company-owned airplanes used for flying training, $5,695; hangar and tie-down rentals, $5,067; gas and oil gross, $4992; sundry income, $722.

Q. That brings us to the end of the thing, doesn't it?

425 A. Yes, except for the liquidation process which certainly has nothing to do with the case.

Q. This takes in the operation for the fiscal years from 1952 on through all the operating period?

A. That is correct.

Mr. Swanstrom: He has given us '52 '53 and '54 We have got them all.

The Witness: There is no 1955, except the liquidation.

Mr. Swanstrom: I understand we have got all operating figures from May 1952 to the end of the operation.

The Witness: That is correct.

By Mr. Swanstrom:

Q. Excluding your liquidating?

A. That is right; that is correct.

Q. This petition for condemnation was filed on October 6, 1954, and an order for possession was entered at that time. That is why we are taking this date, isn't that so?

A. That is correct.

Q. Now, as a matter of fact, you came in and showed there would be distress to some of these people, and
426 the Court extended the period to January 1 to move them out?

A. Only as far as the people. We had to sell the airplanes right away and give you the airfield and hangar.

Q. Within ten days?

A. Yes, within ten days after.

Q. Otherwise the Court extended the period of time for you to vacate the other people to January 1, 1955?

A. Yes.

Mr. Swanstrom: I think that is all.

The Court: Any further redirect?

Mr. Ashenden: I think that is all.

The Court: Witness excused.

(Witness excused.)

The Court: Does the defendant rest?

Mr. Ashenden: Defendant rests. Yes, we rest our case. Pardon me, Judge. Subject to—there are a couple of exhibits which are now marked for identification that are in evidence. I hope we can do that tomorrow.

Mr. Swanstrom: I don't know what to say. I have two witnesses here, but my noon hour was taken up,
427 tired as I was, by the County coming in because of that condemnation of the railroad, and I do need a little time on instructions. My witnesses I don't think will take more than an hour. And I thought we would probably talk to the jury only 20 to 25 minutes apiece, and your reading the instructions wouldn't take very long, so we ought to get through by 3:00 o'clock without any question tomorrow.

The Court: Will you have your witnesses here in the morning?

Mr. Swanstrom: They are here now.

The Court: All right. What is the nature of their testimony?

Mr. Swanstrom: They are in rebuttal.

The Court: On what?

Mr. Swanstrom: It is on the sanitary conditions.

Mr. Ashenden: I would like to be heard on that topic, if I may.

The Court: We will excuse the jury until 10:00 o'clock tomorrow morning and I will hear you on it.

(Whereupon the jury retired from the courtroom, and the following proceedings were had out of the 428 presence and hearing of the jury:)

Mr. Swanstrom: On account of the testimony of Mr. Hartenfeld, I want to renew my motion to the admission of Plaintiff's Exhibit 2, which is the revocation, because of the fact that the notice also carries the information that this notice of revocation is executed by the Secretary of the Navy as evidence of a decision by him that the revocation of said lease is essential, dated July 17, 1954, by J. C. S. Thomas.

The Court: Does it say it is essential for the purpose of obtaining the premises pursuant to the terms of the lease for airfield?

Mr. Swanstrom: No.

The Court: Then my ruling will still be the same. If it had been done for that purpose, we wouldn't be here in my judgment. Motion denied.

Mr. Swanstrom. I just wanted to renew it after his testimony.

Witness Hartenfeld: May I ask a question, your Honor? In the course of my testimony Mr. Swanstrom asked me to file a brief with the jury tomorrow. It is a

little unusual. I am wondering if I am supposed to do that?

429 Mr. Swanstrom: Oh, no.

The Court: We have disposed of that.

Mr. Ashenden: On this rebuttal testimony—

Mr. Swanstrom: Just a moment. On that matter, I think maybe what would be better to bring that at issue is if I draw an instruction relating to the importance of the recital clauses in this case. You can then argue it, and the Judge will probably refuse that instruction.

The Court: The whole matter will be handled on instructions, yes.

Mr. Swanstrom: Well, I will draw it.

Witness Hartenfeld: May we also submit instructions and have him rule on those too?

The Court: We will see what can be done.

Mr. Ashenden: The reason I anticipate an objection or objections on an anticipated basis on the rebuttal testimony that I believe the Government expects to produce is that all of this I think relates again to the topics discussed on our notice to produce. This was related to the production of the originals of various letters, I think about ten letters from the Department of Public

430 Works, and I think from the State of Illinois, which, by the way, we haven't found, and I assume the Government does have copies, and as a result we have not read yet, but I expect that they relate to the question of sanitation of the facilities in the trailer park and Barracks. Is that true, Mr. Swanstrom?

Mr. Swanstrom: Yes, they do.

Mr. Ashenden: I would like an objection to this type of testimony, Judge, for the reason that there has been no evidence at all in this record to date that would indicate that there has been any diminution of income from either the trailer facility or the Barracks facility, that

there has never been a cancellation or threatened cancellation of the lease for seven and a half years; there has never been any kind of a violation that was served upon these people in the sense of a finding by a court. So that, unless there was evidence that would indicate that there had been interruption in the operation, I can't see how this would relate to the question of valuation by indicating that it was not available to a willing buyer, a going concern, such as the trailer park and Barracks.

431 If on the other hand we had an interruption because of some definite violation and we were stopped from operating, then I would say that that would be fine; if they had that kind of evidence, I would say it was competent; but if it is just evidence of some kind of complaints relating to this thing, to the conditions, and someone else's opinion, without a determination by a legal body to stop operating, I don't think it should go in.

The Court: What is the nature of the evidence you propose to present?

Mr. Swanstrom: Let me answer him first. The evidence produced by the defendant is that this was clean, the operation was a clean operation. The secretary so testified. This evidence that I propose to introduce goes a little bit further than their own testimony that there is some smell.

I propose to show that the ditches were filled often with this effluent; it smelled; it is bacteria-infected; that there were considerable complaints by the County Sanitary authorities, and also that they were given the specifications on what would be necessary to make this

432 plant sanitary enough so they could obtain a license or could acquire it.

Mr. Hartenfeld: By whom? Mr. Swanstrom, pardon the interruption, but we are trying to get the facts straight in our own mind. Who gave us that?

Mr. Ashenden: By the State or by the County?

Mr. Swanstrom: By the County.

The Court: Well, have you those documents? Can you submit them to the Court, what documents you refer to?

Mr. Swanstrom: Yes.

The Court: Let me see what documents you propose to offer.

Mr. Hartenfeld: They are all hearsay statements, your Honor.

Mr. Ashenden: Well, let us take a look at them, and see if they have got any absolute violations.

Mr. Swanstrom: And I think it is proper to show what the expense would be, because if a purchaser was going to take this thing on, he would be paying this expense, and it is an element that goes to the economic value of this lease. (Handing document to the Court.)

The Court: Let me see the others.

Mr. Swanstrom: Yes. (Handing documents to the Court.)

433 The Court: Do you propose to put these people on the stand, the people who made these inspections?

Mr. Swanstrom: I propose to put on only the superintendent of the Cook County Board of Health. He is in the courtroom now.

Mr. Ashenden: What is his name?

Mr. Swanstrom: DeJonge. As to some of these letters I am not going to be able to produce the writer, except that DeJonge has been in the department and they passed through his hands. Many times someone else writes the letter.

If you think these letters should not be admitted or—

The Court: I think the best evidence would be the man who made the inspection.

Mr. Ashenden: That is right.

Mr. Swanstrom: That is Mr. DeJonge.

Mr. Hartenfeld: These are self-serving otherwise.

The Court: Under the circumstances the letters would not be admissible when you have the person who made them present. As to those where you have not produced the writer of the letters, they would be deprived of the right of cross examination.

434 Mr. Swanstrom: If counsel will admit the receipt of the letters—

The Court: That would be another matter.

Mr. Ashenden: They still would not be admissible.

The Court: I certainly feel they would be entitled to put on evidence in rebuttal showing conditions different from those testified to. I think that would be something which the jury would have a right to take into consideration in arriving at a value, in my judgment. But just the offer of the letters, the fact that they come from the department, would not be sufficient.

Mr. Ashenden: I would have no objection, your Honor, to a man testifying what he found as to cleanliness.

The Court: He can tell what he found.

Mr. Ashenden: I do not, if the court please, think he is entitled to express an opinion as to his thoughts as to whether these people were in violation of any law. I do not think he should be entitled to say that.

Mr. Swanstrom: That is his job. Why are you trying to suppress evidence all the time? I am not telling you—

Mr. Ashenden: I am not trying to—

435 Mr. Swanstrom: Wait until I put on all our evidence.

The Court: We will rule on the questions when they come up. There is no doubt but what he is entitled to say what he found. There may be a serious question as to his giving an opinion as to whether or not it is a violation of law.

Mr. Hartenfeld: He is not a lawyer.

Mr. Swanstrom: He is a sanitary engineer, which is a whole lot better than a lawyer.

Mr. Hartenfeld: But he cannot construe the laws.

Mr. Swanstrom: I have had too much construction of law from the witness stand.

The Court: We will pass on questions and objections when they are made.

Mr. Hartenfeld: Just so we have the right of cross examination here.

(Thereupon an adjournment was taken until 10:00 o'clock a.m. of the following day, April 12, 1957.)

436

* * (Caption—File No. 54 C 1468) * *

Before Judge Perry and a jury,
April 12, 1957, 10:00 o'clock a.m.

Trial resumed pursuant to adjournment.

Present:

Same as before.

(Whereupon the following proceedings were had in open court, out of the presence and hearing of the jury:)

Mr. Ashenden: There is one matter, your Honor, that I think is strictly a question of law, and this is—

The Court: So the record is clear, this is out of the presence of the jury.

Mr. Ashenden: Mr. Swanstrom stated yesterday
437 at one point of the cross examination of Mr. Hartenfeld—he touched upon the income tax returns of the Illinois corporation, and I believe he said something about offering or introducing them in evidence.

The reason I bring this up at this time is that this type of evidence I believe is of such an extremely prejudicial nature, that if the offer were made and then be objected to, the jury might get the wrong impression even though the objection ultimately were sustained.

The reason I state that is that the sole question in this case is the question of the fair market value of this leasehold. The jury has heard gross figures up to now. The entity of this hypothetical willing buyer or seller is not a question at all for the jury. In other words, whether the buyer or the seller would be a corporation, a partnership, a tax-exempt body or even an individual or group of individuals, would of course vary the amount of tax, the rate of tax, the type of deductions, all of these things that they would be entitled to as far as our federal income tax laws are concerned.

Relating solely to the evaluation of this lease-
438 hold, the tax returns of this entity, which happened to be a corporation, I believe would do nothing but prejudice the minds of the jury, because in that type of proof—

The Court: Let us first find out whether he is going to make his offers of income tax returns. He mentioned it, but he might have changed his mind. So let us see if he is going to make an offer first.

Mr. Swanstrom: I merely asked the witness if these records that he was testifying from were accurate. He said they were, if you recall. I said, "Are you absolutely sure?" He said he was.

I said, "Do you know whether or not they agree with your income tax returns?"

He said, "I could not say as to that."

I said, "I have your returns."

Your Honor, the reason I did that, and this might sound unbelievable, but I knew that there was such a huge discrepancy between the figures of gross income testified to and the figures shown in the returns, that I wanted to give the witness, who is a counsel, a lawyer, the evening to check the matter. I am not at all interested in embarrassing anybody.

439 I mentioned it; I did not flash it before anybody, I did not offer it, as many lawyers would have done, in the face of the jury, and then have it probably denied and then the effect would have been there.

We have them, they are the originals. We have certified copies that are admissible under the rules in any court where the United States is interested or is a party.

I would be perfectly willing to have the witness examine these, see whether or not he wants to change his testimony. There is no desire on my part to introduce anything. If there is anything wrong, I am not in that section of the United States Attorney's office—

The Court: What you are proposing to do is to offer them for the purpose of impeaching the witness?

Mr. Swanstrom: Absolutely, for rebutting his testimony. For instance, I would say—

The Court: Show them to him.

Mr. Ashenden: Let me say this, if the court please. This completely surprises me, because we did not even check—we have not seen these income tax records. We did not raise this point on the question of worrying 440 about Mr. Hartenfeld's testimony on this subject.

I am convinced that these income tax records will bear out the evidence as he testified to it on gross fig-

ures. There is no question about embarrassing anybody. I am talking about the admissibility of these on the question of fair market value. I have not seen these things.

Mr. Swanstrom: I have no objection to doing what you did in your case and proving the amendment—I mean the extension of the lease. If only that portion of the return which shows gross income is read, that would meet all that I would require. I am not interested at all in embarrassing him except to destroy his evidence as to the amount of gross income they had. Whatever else there is in there, I am not at all interested in that.

Mr. Hartenfeld: If the court please, there is a very serious charge here by counsel. We would like to see what he is talking about.

Mr. Swanstrom: I have made no charge.

Mr. Hartenfeld: Actually I testified yesterday and I say it again—I testified from a report prepared by our auditor, based upon his audited statements that he gave me as an officer of the corporation. I personally never said that I examined the books and records, but I am making a flat statement that the grosses that I testified to yesterday appeared in these audited statements.

441

Mr. Swanstrom: I understand that you said that, Mr. Counsel. I am not embarrassing you.

Mr. Hartenfeld: Knowing our company, I am sure there is nothing wrong with this picture.

The Court: It was my thought, my present thought is that the only purpose for which you could offer the income tax return would be in rebuttal to his testimony—

Mr. Swanstrom: Exactly the reason I am talking about it.

The Court: Such part of them as could be offered. Show them to counsel and—

Mr. Swanstrom: That is all I want to do.

Mr. Hartenfeld: May I examine these a little bit, your Honor, to look them over?

The Court: Yes. One may be talking about fiscal years, and—

Mr. Hartenfeld: No, these were—

The Court: Are the income tax year and the fiscal year the same?

Mr. Swanstrom: No. I had that explained on the 442 stand, that their fiscal year starts differently.

The Court: We will take a little recess to give you an opportunity to look at those.

Mr. Swanstrom: I want the court and counsel to understand that I have tried to handle this rebuttal as decently as I know how. I do attack—I want to destroy only the evidence as to gross income.

(A recess was taken.)

Mr. Ashenden: We are still in the midst of this thing.

The Court: I would like to get started in this matter.

Mr. Hartenfeld: If the court please, I have checked this and I understand what the Government is concerned about.

First of all, it is absolutely accurate. We have just checked the returns, I personally have. Apparently Mr. Swanstrom and his assistants did not have enough background in tax matters to understand that you do not add up all the income that I testified to and then expect to find a lump sum figure in one place in an income tax return. There are all kinds of depreciation costs and other factors and expense items that only an income 443 tax man understands. I am not an expert but I certainly know what happened in our returns.

What I testified to is 100 per cent accurate. They want to send up upstairs and get an accountant, which I would be very happy to have them do, and have him go through

this and confirm what I have just now said, because they apparently do not understand enough about taxes to corroborate what I am saying.

Meanwhile we are holding up the whole trial, and my point, your Honor, is simply this, that even if I were to assume that I committed perjury yesterday, I do not think this is admissible in evidence for a lot of reasons, referring to the income tax returns. Their remedy would be to indict me and to send me to jail for perjury.

It is my suggestion that we can proceed with the trial without bringing in the income tax returns, and I am very aggravated that this came up, because it has delayed all of us, particularly your Honor, who has pressing matters. There would be no cause for this delay if the Government knew something about how to fill out an income tax return.

I am sorry, your Honor.

444 The Court: Does the Government have a motion or something that they are going to offer here?

Mr. Swanstrom: The only thing we had was, and I sent for certified copies for that reason, it says here, "Gross receipts, $56,972," on the face of it. Then I asked income tax people upstairs to analyze that situation against his testimony.

Well, it appears on one of these returns that there is an exhibit where there is more—

The Court: Why was not all of this thrashed out in advance?

Mr. Swanstrom: In advance of what, your Honor? The man testified yesterday afternoon.

Mr. Hartenfeld: If the court please, you can always set aside any verdict in this case if we are wrong about this matter. I would suggest that we proceed, with the assumption that if we are wrong in our figures that we submitted, you can set aside any verdict we may have. Otherwise we are going to hold up the trial—

The Court: Will you stipulate to that effect?

Mr. Hartenfeld: Yes, sir.

Mr. Swanstrom: That is all right with me.

445 The Court: What?

Mr. Swanstrom: That is all right with me. If at two o'clock or any time before—

Mr. Hartenfeld: You are now putting a time limit on me. I have a right to bring in my accountant to explain figures to me, but I know enough about this to tell you that this is an honest return and that what I testified to is backed up by—

Mr. Swanstrom: If you will—

The Court: The thing that concerns me is how does one branch of the Government get a confidential file down here—

Mr. Hartenfeld: That is what I—

The Court: —without going through court.

Mr. Swanstrom: Because of the rules.

Mr. O'Malley: Rule 44 provides that;

"Official records may be authenticated by certified copy".

And 458 and 204 of 26 C.F.R. 335 states that:

"Returns of copies thereof shall be available to the U. S. Attorney in proceedings before U. S. grand juries or in litigation in any court where the United States is an interested party."

446 Mr. Hartenfeld: Pursuant to a court order, as far as I understand that.

The Court: I don't know, but as far as that is concerned it would seem to me that the confidential nature of income tax returns is going to be laid wide open if we allow the regular use of them without the court being advised about it.

Mr. Hartenfeld: That is right, your Honor.

The Court: I think those matters should have been brought to this court's attention and the court should have ordered it, and the court has ordered it in a number of instances, but I think to leave it to the discretion of anyone to go in and open up income tax returns violates the very secrecy of the purpose and you are going to destroy the very purpose of the Act. I don't believe that that rule should be so interpreted as to allow these returns to be available under those circumstances.

Mr. Hartenfeld: Your Honor, I would like to make a motion at this time that we exclude these income tax returns, for the reasons, first, that they did not get a court order, and to ask your Honor for permission to bring those income tax returns into the picture.

447 Further, I move to strike any mention of these income tax returns to the jury for the reason that they are completely immaterial, they show only net profits, which have been carefully excluded from this trial, to date, we have been talking only about gross income.

Thirdly, on the point that income tax returns, particularly in this case where I as a witness have testified that the corporation engaged in other enterprises which were not directly related to the facilities which are the subject of this case, they have absolutely no materiality on that ground alone, your Honor, because anybody who knows about income taxes knows that you have to subtract income and expense items and other things in your income tax returns to arrive at a net profit, and here I have testified in this case that we were engaged in other businesses that had no relationship whatsoever to the airport, the trailer park and the barracks activities; and those other expense items were all included against income received from these three items, and legitimately so under the tax laws.

I think the jury will be completely confused as to the net value of this property.

448 The Court: It is already before the jury that your income tax returns are going to be presented, because Mr. Swanstrom stated—

Mr. Swanstrom: No, your Honor, they are not. I merely announced that I have them.

The Court: Just a minute. You said yesterday you had those returns and you would show them, and it was very clear to the jury that you were going to introduce those income tax returns. I heard you say it yesterday, and it is right in the record.

I don't know, I am perfectly frank in speaking, I am concerned about this casual use of income tax returns by the Government. I think the District Director had better begin to be careful before he just turns over income tax returns without an order of court approving the turning over.

I am going to deny your motion. Now that the income tax matter has been brought up I think we had better have the whole thing out, even if it takes two or three days more trial.

Mr. Hartenfeld: In what way, your Honor? It would just emphasize—

The Court: It is already before the jury that your income tax figures are going to be here, and they are going to want to know why they are not here.

449 Mr. Ashenden: If the court please, the only thing—

Mr. Hartenfeld: If the court please—

Mr. Ashenden: I think the only thing before the jury is that Mr. Swanstrom had stated that he would offer them, but that doesn't mean they are admissible.

The Court: That is right.

Mr. Ashenden: And certainly I don't think any of them are admissible.

Mr. Swanstrom: I don't think you will find any place in the record where I said I was going to offer them.

Mr. Ashenden: And so, to go into the whole detail—

The Court: No, I don't think he said he would offer them. He said he would have them there, but the inference was very clear.

Mr. Ashenden: I still say that they are not admissible, so that to go ahead and hold this trial up because there is certain inadmissible evidence that we should look into, I don't think that is fair. I think the stipulation that Mr. Hartenfeld talked about, that if there is a discrepancy that would go to the weight of this evidence—
450 I am not talking about a couple of cents or anything like that, I am talking about a discrepancy that would go to the weight of this evidence—we will stipulate to set aside your verdict.

This goes ahead with an orderly fashion of trials and permits everybody to accommodate them in their own type of docket, but I don't think that we should withhold this trial on the basis of evidence that is highly inadmissible anyway, just because the Government unfortunately and mistakenly has misconstrued Mr. Hartenfeld's testimony.

The Court: It has been before me. I think I should know and determine about it before it is over with.

Mr. Hartenfeld: If the court please, if you will just take five minutes to go over the 1943 return, I will show you in one second what they have done.

The Court: Let us see it. That is what I want to see.

Mr. Hartenfeld: The 1953. I am sorry.

The Court: I happen to know a little about income tax matters myself—

Mr. Hartenfeld: That is fine.

The Court: And I know just what you are talking about.

451 Mr. Hartenfeld: Where is the return for 1953?

The Court: We will go off the record just a moment.

(Short interruption.)

The Court: Let me see that.

Mr. Hartenfeld: It is hard to explain this unless I point to this right over your shoulder, your Honor.

The Court: Come right up and sit here, and counsel for the Government, will you come up here?

Mr. O'Malley: Does anybody know anything about income tax?

Mr. Hartenfeld: The judge said he does. Nobody else does, but he does.

The Court: If there is a discrepancy I want it before the jury. If there is not a discrepancy I don't want it before the jury.

Mr. Hartenfeld: This is the only one that I have had a chance to—

The Court: If there is a discrepancy in the figures demonstrated by the income tax returns, the Government is entitled to show it on rebuttal. If there is not a material discrepancy, they are not, and I don't want it gone into.

We will take this off the record. This is discussion 452 now.

(Discussion off the record.)

The Court: On the record.

The court has checked a photostatic copy of return for the year 1953, and I am convinced that the figures that are in this return are identical with the figures that are in the testimony of the witness Hartenfeld. I am

somewhat familiar with the procedure of income tax matters, both from my experience as a lawyer and also from the number of cases that have been before me, and I can readily see that there is no discrepancy of any material consideration so far as 1953 is concerned. Inasmuch as there is no discrepancy in the return so far as 1953 is concerned, the court considers it not necessary to delay the case to wait on the other returns.

I think that covers that matter.

Now let us get the jury and go ahead with the rest of the matter.

Mr. Hartenfeld: If the court please, may we ask that this be clearly stated to Mr. Swanstrom—

The Court: I will clearly state to the jury that I have examined the returns referred to by counsel, that will clear the minds of the jury, I have examined them 453 and I am satisfied there is no discrepancy between the report made and the testimony given.

Mr. Hartenfeld: I am more fearful of any comments Mr. Swanstrom might make in his closing address to the jury.

Mr. Ashenden: He won't do that. Don't worry about that.

The Court: Mr. Swanstrom is an honorable gentleman—

Mr. Ashenden: He certainly is.

The Court: He will certainly make any statement that is based on the record—

Mr. Hartenfeld: In other words, he will not comment on—

The Court: I wouldn't attempt to caution him—

Mr. Ashenden: If the court please—

The Court: —because I know if he makes a misstatement it will be with a sincere heart and zeal and clear conscience.

Mr. Ashenden: I want to say that I think he has been extremely fair in this entire matter.

The Court: I think so.

Mr. Hartenfeld: On that point I certainly—

The Court: I might disagree with him on some-
454 thing, but I do with you gentlemen, too.

(The following proceedings were had in open court, in the hearing and presence of the jury:)

The Court: Ladies and gentlemen of the jury, we have a little more evidence here, and the court has spent considerable time. There was some reference that there might be some testimony concerning the income tax of this defendant in this instance, and I say there will not be any evidence. On technical grounds I might have been able to exclude it, but I do not exclude it for that reason. I have carefully examined the returns, and while the returns do not state the exact same figures as was testified to yesterday for the year 1953, with the court's familiarity with accounting practices, and the exhibits that were demonstrated and attached to and made a part of the income tax return, all the figures are there, and they are divided up a little differently, as the income tax forms require, as you people who have made income tax returns are aware, that your bookkeeper may set your books up one way, and when you get to make up your income tax return you have got to conform to the manner in which the income tax form requests it. In conformity with
455 that, there did appear to be some inconsistency, and the Government's counsel, Mr. Swanstrom, in first observing it, made some statement that he had them, and he was right, in first looking at it there appeared to be some difference, but upon comparing them I find there is no difference.

Therefore we will not go into that question. I want you to understand it thoroughly.

There is no intimation, and counsel for the Government did not mean to intimate, either, that there was anything wrong with the tax return, and there is not so far as I am able to see it, at least, there is no inconsistency between the forms submitted and those that were made by the company. The returns are made from the same statement, apparently, that was being testified to.

I just want the jury not to hold that either against the Government or the defendant, because in the trial of a lawsuit when you see something you have got to ask a question about it. The question has been asked, and it has been answered to my satisfaction.

Now, we have some other evidence.

Mr. Swanstrom: If the court please, I suspect the
456 proper thing would be to file the notice for the production of original correspondence and documents, and we talked about that yesterday. I am not going to ask for the introduction of more than two of these, because I have the witness who either dictated them or signed them. I suspect this ought to be filed.

The Court: All right. I will direct that that be filed.

Mr. Swanstrom: At the same time I want to offer under the rules, Rule 44, a certificate by the Director, Department of Public Health, State of Illinois, to the effect that there has been no state license issued for the operation of a trailer camp in this—

Mr. Ashenden: May I see it?

Mr. Swanstrom: Yes, surely.

I think that is all that is necessary under Rule 44.

Mr. Ashenden: We have no objection to this.

The Court: It may be admitted. This concerns that 1954 statute?

Mr. Swanstrom: That is right.

The Court: It went into effect July 1, 1954, did it?

457 Mr. Swanstrom: It was passed in 1953, giving a full year's notice.

The Court: And went into effect July 1—

Mr, Swanstrom: It went into effect—

The Court: I believe it went into effect, we said, July 1.

Mr. Swanstrom: May I read the statute at this time?

The Court: Yes. That will be better.

Mr. Swanstrom: I will read to the jury from Smith-Hurd Illinois Annotated Statutes, from Chapter 111½, Section 162:

"A trailer coach park or park means an area of land upon which two or more occupied trailer coaches are harbored either free of charge or for revenue purposes, and shall include any building, structure, tent, vehicle, or enclosure used or intended for use at a part of the equipment of such trailer coach park".

That is merely to describe the use of this word.

Section 166 provides:

"No person, firm or corporation shall establish, maintain, conduct or operate a trailer coach park

458 after April 30, 1954 without first obtaining a license therefor from the department. Such license shall be issued for one year and shall expire at midnight on April 30 of the year next following the issuance thereof, and the license shall be renewed from year to year upon the payment of the annual license fee herein".

Then it provides for the application for such license, and Section 167-C provides:

"The proposed and existing facilities in the trailer coach park for water supply, sewage, garbage and waste disposal, fire protection and for sanitary community building which will include a description of

the toilets, urinals, sinks, wash basin sinks, slop sinks, showers, drains and laundry facilities, the proposed alteration therein and the maintenance thereof".

The Court: And when does that say it was effective?

Mr. Swanstrom: The Act was passed July 13, 1953, and Section 166 says that after April 30, 1954—

The Court: All right, so the jury knows that.

Mr. Swanstrom: The prohibition to operate without a license took on May 1, 1954.

The Court: Admitted.

Mr. Swanstrom: Mr. DeJonge, will you take the stand?

ROBERT DE JONGE, called as a witness herein on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Swanstrom.

Q. Will you state your name?

A. Robert DeJonge.

Q. Where do you live, Mr. DeJonge?

A. 1157 W. Grant, Desplaines.

Q. What is your business or occupation?

A. I am a sanitary engineer with the Department of Public Health.

Q. How long have you been so employed?

A. Since August of 1940, except for such time that I was in the Navy.

Q. That will be 17 years?

460 A. I was in the Navy for three years.

Q. How many?

A. Three years.

Q. Three years?

A. Yes, sir.

Q. They give you time off for good behavior, then?

A. That is right.

Q. Have you made any study at any of our institutions on the matter of sanitation, sanitary facilities?

A. Do you mean like technical background?

Q. Yes.

A. Yes. I am a graduate of the University of Illinois, graduated in 1940, received a Bachelor of Science degree in civil engineering.

The Court: I imagine that counsel—

Mr. Ashenden: I will stipulate to that, your Honor.

The Court: —will stipulate?

Mr. Ashenden: Yes.

The Court: By virtue of the office that he holds, that he is qualified to testify.

Mr. Ashenden: Yes, your Honor.

461 Mr. Swanstrom: Very good.

Q. Among your duties, your position now with the department is what?

A. I am chief sanitary engineer.

S. How long have you been chief sanitary engineer?

A. Since February 1st of this year.

Q. Before that time who was?

A. Mr. Leland, Ben J. Leland.

Q. And you took his place?

A. That is correct.

Q. During the time that he was there you worked with him, I suppose?

A. That is right.

Q. Part of your duties were to inspect sites and see whether or not they complied with the Cook County health regulations?

A. Yes, sir.

Q. Does Cook County have regulations that are enforceable against these trailer camps?

A. Yes, sir. We have a tourist camp operating ordinance.

Q. And how long has that been in effect?

A. That was passed in—let me refresh my memory.

462 Q. About ten years, anyway, isn't it?

A. March 11, 1949. It was approved and adopted by the Council.

Q. And part of your duties would be to inspect, to see whether or not there was compliance with—

A. Yes, sir.

Q. —those regulations, sanitary regulations?

A. Yes, sir.

Mr. Swanstrom: Will you mark these two letters as Plaintiff's Exhibits 6 and 7?

(Said documents were marked, respectively, Plaintiff's Exhibits 6 and 7 for identification.)

By Mr. Swanstrom:

Q. I show you these two letters purporting to have come from the Cook County Department of Public Health, and ask you what if anything you had to do with the preparation or the sending of those letters?

A. This one I originated.

Q. That is, you are talking about Plaintiff's Exhibit 6 for identification?

A. Exhibit 6.

Q. That you originated; what do you mean by that?

463 A. I wrote the letter and had it typed, and Mr. Leland signed the letter.

Now, Exhibit 7, although I did not originate this letter, however, in my position at that time as assistant to Mr. Leland at that time, I did sign his name to the letter.

Mr. Swanstrom: I am offering these letters in evidence, so counsel can prepare their objection.

The Court: Any objection?

Mr. Ashenden: Oh, yes, we are objecting to both of these, on the grounds that they contain in them certain conclusions and other hearsay evidence, even some reported opinions of parties that apparently didn't even write the letter. I think the best evidence would be what this witness saw, if he saw anything, and not conclusions expressed in the letters.

Both of them are objected to for that reason.

Mr. Swanstrom: We had letters introduced by defendants that were taken out of the Navy's files, without
464 any regard to who had signed them and who they were; they were just simply taken out of there and introduced. I think it would shorten the thing if the letters were introduced and read, then it would be to try to—

The Court: Counsel, there is quite a difference. You admitted the genuineness of those letters, and this man is disputing the genuineness of these letters.

Mr. Swanstrom: I don't think he is. Are you disputing that these are from the—

The Court: He is disputing the truth.

Mr. Ashenden: I am disputing the truth.

The Court: He is disputing the truth therein. He says this man is quoting what other people have reported. This would be just like the police, in place of having a policeman testify as to what he did at the scene of an accident, to let his report go in evidence. If this man has made a report let him testify. Objection sustained.

Mr. Swanstrom: Of course, when you asked me if I admitted the genuineness of the documents I meant—
465 The Court: The authenticity.

Mr. Swanstrom: I meant that it came out of the files, whether I said it or not, that there wouldn't be anything spurious in the files, but I didn't say that I

admitted any part of the contents of it, or the authority of the people to make any representations.

Mr. Ashenden: That isn't what you said at the time, Mr. Swanstrom.

Mr. Swanstrom: I was asked if I would admit the genuineness—

The Court: It is a question of authenticity. If there is any question about whether or not those letters were written or signed by the persons, I am ready to hear it, but as I understood—

Mr. Swanstrom: No, I made no objection about that, because they were taken out of our files. Now, these, if he is objecting because these were taken out of the Cook County Department of Health files—

The Court: He is not objecting on that ground. If
466 he had had the copies and had turned them over to you he would still object, because any copy or any notice he received—he has read the documents and he says this purports to be a summary of what somebody else has found. This witness says he wrote one letter and somebody else signed it. He says another man wrote one of the letters and he signed it.

Mr. Swanstrom: Very well. He has invited the witness to testify as to what he saw.

The Court: That he can testify to.

Mr. Swanstrom: Very good.

Q. Mr. DeJonge, are you familiar with the Arlington—

The Court: While we are on that, however, for purposes of cross examination, if the witness has written a letter, he should be called to testify about what he saw and what he did, but if he testifies in any way contrary to it, the other side has the right then to offer the letter not to prove the facts, but to show any inconsistency or to impeach. At the present time, however, his testi-
467 mony is all this court can hear.

All right. He may answer.

Mr. Ashenden: If the court please, prior to the testimony of this witness I would request the court to instruct the witness not to refer to any notes but to refer to his recollection.

Mr. Swanstrom: Unless he—

The Court: Wait a minute. He should first testify solely from his recollection, and when he exhausts his recollection and so states, then he would have a right to refer to notes, not before, however.

Mr. Swanstrom: You have a funny way of trying to condition all my evidence.

Mr. Ashenden: I will ask that the remarks be stricken, if the court please.

By Mr. Swanstrom:

Q. Do you understand, Mr. DeJonge—

The Court: Each of you lawyers have a right to express your opinions.

Mr. Swanstrom: It is the way we have been going all the way through.

Mr. Ashenden: I am just following the rules of 468 evidence, if the court please.

Mr. Swanstrom: The rules of evidence do not imply that you should condition my witness before I start with him.

The Court: Let us get back to this evidence.

Mr. Swanstrom: Yes.

Q. You are familiar with this site that is in dispute here, the Arlington Airfield?

A. Yes, sir.

Q. You are familiar with the septic arrangements, the sanitary conditions of the disposal of sewage?

A. Yes, sir.

Q. You have been on the place?

A. Yes, sir.

Q. Will you please tell the court and the jury when you were last on it and what you found?

That is a pretty general question.

The Court: First when. When was the last time he was there.

Mr. Swanstrom: Yes.

The Court: The best you remember.

The Witness: Well, the last time I was on the premises was, I believe, in 1954, if I am not mistaken. However—

469

The Court: At what time?

The Witness: I don't recall that.

By Mr. Swanstrom:

Q. But at that time, as I talked with you, you didn't make any examination—

A. No, sir.

Q. —of the situation at that time?

A. No, sir.

Mr. Swanstrom: So we are not referring to that, if your Honor please.

The Court: All right.

By Mr. Swanstrom:

Q. But you apparently were there in October, 1952?

A. Yes, sir.

Mr. Ashenden: Objection to the leading question, if the court please.

The Court: I think he may ask him that.

By Mr. Swanstrom:

Q. Was that right?

A. Yes, sir.

Q. Well, then, will you tell the court and jury what you found in reference to this sanitary situation?

470

A. In regard to the sewage treatment plant?

Q. Yes.

A. The sewage treatment plant—

The Court: This was when, in 1952?

Mr. Swanstrom: 1952, in October.

The Court: October, 1952.

The Witness: Yes, sir.

The Court: All right.

By the Witness:

A. The sewage treatment plant was in the same general condition as in previous inspections. In 1948, I believe, was the first inspection I made out there. By that I mean the component units of the sewage disposal system were the same. There had been no additions or alterations to that system.

The system is composed of a large horizontal, cylindrical septic tank. The usable volume of that tank is approximately 6600 gallons. The sewage from there flows into a dosing tank with twin dosing siphons. From there sewage is pumped onto twin sand filter beds.

The Court: Counsel, you are calling this man for rebuttal. Now he is just giving us a general description. 471 Let us find out in what respect his testimony rebuts the testimony that was heretofore given. We have had all of this.

Mr. Swanstrom: If your Honor will recall, I offered to prove something in reference to this on my direct, and you said I would have to wait for rebuttal. All I am trying to do now is to rebut that the—

The Court: All right, go ahead.

Mr. Swanstrom: All right.

The Court: Proceed.

By Mr. Swanstrom:

Q. You say 6600 gallons?

A. Yes, sir.

Q. How many persons could be housed who use this system with that kind of facility?

A. We don't determine persons as such when we design treatment plants for trailer camps. We usually design a system for that based on the number of units, the number of trailer camp units, and that usage is figured at approximately 100 gallons per unit per day. Now, a trailer in itself is usually figured out at about two and a half people per trailer, but for our pur-
472 poses we usually go according to units. Therefore this system could handle, if properly maintained, 66 trailer units, or approximately 125 to 150 people.

Q. Did you observe at any time that you inspected this whether or not the effluent—do I understand by "effluent" that that is the liquid after the solid has been deposited in the tank subseqently to be removed, and the effluent is what flows over onto the sand beds?

A. Yes.

Q. And that that is what is drained out and finally goes into some stream?

A. That is right.

Q. When you went out there and inspected this, did you find whether or not this effluent was escaping with bacteria?

Mr. Ashenden: Objection, if the court please, to the leading question.

The Court: He may ask him. It is leading, but he may ask him.

By the Witness:

A. At the time of my inspection I found that the system as a whole was grossly overloaded—

Mr. Ashenden: Objection.

473 Mr. Swanstrom: It is a fact, I think.

The Court: I think it may stand. Objection overruled.

By the Witness:

A. The sand bed was not being maintained in a good

operating condition, the effluent from the dosing tank was not being distributed entirely over the two sand beds, some of the retaining walls surrounding the beds were broken, and effluent was not only escaping through the underdrain system in the sand bed but also over the top of the sand bed through the break in the walls and out into the ditch. The effluent as it left the sand bed was causing an extreme pollution condition in the ditch.

By Mr. Swanstrom:

Q. And that is what is supposed to be prevented for the protection of health?

A. That is right.

Mr. Swanstrom: I think you may cross examine.

The Court: Cross examine.

Mr. Ashenden: All right.

The Court: I don't want to limit you, counsel. I 474 will abide your cross examination. I don't want to hurry you. I just ask you, how long will your cross examination take?

Mr. Ashenden: Five or ten minutes, at the most.

The Court: Very good.

Cross Examination by Mr. Ashenden.

Q. You have referred now to an inspection that you made in 1952, and you are familiar, you said, with the premises prior to that time in 1948, I think, you had another inspection?

A. Yes, sir. My first complete inspection was made in 1948.

Q. After you made this inspection in 1952, did you make any other inspections prior to this time that you visited the place after that—strike it. I will try to say it the right way.

From 1952, October, when you made this inspection,

until you made another one in 1954, you don't remember when, did you ever visit the premises again?

475 A. Not for purposes of making a complete inspection of the park, no.

Q. Do you know whether the park kept in operation from the time that you first saw it in 1948 through 1954, when it was terminated by this condemnation case?

A. Yes, sir.

Q. It did?

A. Yes, sir.

Q. Mr. DeJonge, did you know a Mr. Scheer, who was an Assistant State's Attorney during the time that you have been connected with the department, Jack Scheer?

A. I think I met him once or twice. That was quite a number of years ago.

Q. That was back in 1947?

A. Yes.

Q. He is now deceased. Did you know Martin Handelman, who was an Assistant State's Attorney?

A. Yes, sir.

Q. Well, did you know what Handelman's particular job was with the State's Attorney's office?

A. Part of his job, the part that I was familiar with, was handling cases for the Health Department, of

476 all types.

Q. Are you familiar with an opinion that was written back in 1947 or 1948—

Mr. Swanstrom: I object to that, your Honor. He is just going into what he refuses to have me go into. I had asked for somebody's opinion. That person isn't here. It is thoroughly hearsay. I don't know what the opinion says, but I think it should be stopped right there.

The Court: This is cross examination, and he has testified as to the condition. We will let him ask—

Mr. Swanstrom: Maybe my objection is premature.

The Court: Just a minute.

Mr. Swanstrom: I will reserve it until he asks it.

The Court: Just a minute. I don't know yet whether he is going to ask about the contents of the opinion or not. He may ask him whether or not he is familiar with it. Objection overruled. He may answer.

Are you familiar—

477 By Mr. Ashenden:

Q. With an opinion that was written by the State's Attorney's office concerning this particular property in 1947 or 1948?

Mr. Swanstrom: I object to it as absolutely immaterial.

The Court: We are talking about alleged irregularities, and he is entitled to be asked whether he is familiar or not. He may be or he may not be.

By the Witness:

A. I am not quite sure I know what opinion you are referring to.

By Mr. Ashenden:

Q. Well, let us put it another way. Part of the concern that your department has is overall compliance by trailer parks with all of the applicable ordinances of the county, is that correct?

A. That is correct.

Q. In the normal procedure, when you are inquiring into any particular trailer camp, isn't it a prerequisite that you obtain an okay letter or an approval letter from the zoning bureau of Cook County in connection with such trailer camps?

478 A. Usually we ask the county zoning bureau whether the land is properly zoned for trailer camps, yes, sir.

Q. Well, now, isn't there an operation of a trailer camp going on right now in O'Hare Field that does not have a Cook County license?

A. Yes, sir.

Q. How many trailers are there?

A. I don't know.

Q. Do you inspect that?

A. No, sir.

Q. Why don't you inspect it?

A. It is on Government property.

Q. Was this on Government property, too, this particular field?

A. Yes.

Mr. Ashenden: That is all.

Redirect Examination by Mr. Swanstrom.

Q. Well, this property was being operated by a private corporation, was it not?

A. Yes, sir.

Q. The Arlington—the Illinois Aircraft Sales and Service Corporation?

479 A. Yes, sir.

Mr. Swanstrom: I think that disposes of that.

Mr. Ashenden: It is still, it was still on Government property, isn't that right, sir?

By Mr. Swanstrom:

Q. Do you know of any rule that prevents Cook County sanitary officials from inspecting a private operation for profit merely because the operation is being conducted by a private concern on a land that is owned by the United States?

A. No, sir.

Recross Examination by Mr. Ashenden.

Q. Do you know whether or not this trailer camp that is being operated out at O'Hare Field is being operated by a private individual actually under lease from the Government, from the Army?

Mr. Swanstrom: I object to this—

The Court: Objection sustained. We are not concerned with that.

Mr. Swanstrom: No.

480 Mr. Ashenden: One other question, your Honor, that was not covered.

Can I see the picture of the overall site?

Q. I don't think we have covered the location of this tank that you are talking about as it relates to the hangar building, for example. Is this tank on the premises—in the picture, rather? You are referring now to Plaintiff's Exhibit 4.

A. It is hard to say. If it were on here it would be about in this area.

Q. Maybe it is on the other picture.

Mr. O'Malley: No, it is the same picture.

By Mr. Ashenden:

Q. This may have it. This is Plaintiff's Exhibit 3. Is it on there?

A. Yes, sir. These are the sand beds, here is the septic tank and dosing tank.

Q. Now, am I encircling the septic tank house—is that a house enclosure?

A. No.

Q. What is that?

A. That was a shack. I don't know what they used it for.

481 Q. Where is the tank? Will you encircle the tank in the field?

A. Well, I don't know how far the tank extended—

Mr. Swanstrom: You had better draw a square. You have got a circle, haven't you, on the other one? Why don't you have him make a square?

Mr. Ashenden: All right.

The Court: What exhibit is it on? That will tell the story.

The Witness: Roughly this area.

Mr. Swanstrom: Both of them have got—

Mr. Ashenden: We are marking on Plaintiff's Exhibit 3 the location of the tank and the field.

The Court: All right. Number them so that there will be a distinction as to which is which.

Mr. Ashenden: Well, the markings are both on the same exhibit.

The Court: Number them 1 and 2 or something—

Mr. Ashenden: All right.

The Court: So that there will be a distinction. 482 Let the witness mark which is which, and let it go into the record, which is the field and which is the other.

(Witness complied.)

The Court: Which is numbered 1 and which is numbered 2?

By Mr. Ashenden:

Q. All right. Number the shower house here 1, put a 1 by that.

The Court: The shower house is No. 1, and the other is No. 2, that is clear.

The Witness: This 2?

Mr. Ashenden: Yes.

The Court: Is that all for this witness?

Mr. Ashenden: That is all, if the court please.

Mr. Swanstrom: I would like to ask him one question.

The Court: All right.

Redirect Examination by Mr. Swanstrom.

Q. Have you an opinion as to what it would cost to put these facilities into a shape where they could
483 accomodate, say, 500 people and obtain a state license?

Mr. Ashenden: Object, if the court please. Now he is talking about a state license. This is a county official. There is no showing that a county license, if that is what you are getting at, is required in this case.

The Court: Objection sustained. That is not what the rebuttal testimony is here for anyhow. He is here concerning the condition, he is called concerning the condition of the place.

Mr. Swanstrom: Of course, there is plenty of evidence here that a permit is required from the county.

Mr. Ashenden: Objection.

The Court: There is no evidence that this man is qualified to tell what it would cost.

Mr. Swanstrom: Very good.

The Court: He has not been qualified in any respect concerning one who constructs—

Mr. Swanstrom: Very well. That is all.

484 The Court: —or one who knows about cost.

(Witness excused.)

The Court: You have one more witness?

Mr. Swanstrom: I have two short witnesses here. Here is the man who can tell what it would cost.

The Court: I think we had better adjourn, then, for our noon recess, until two o'clock.

Mr. Swanstrom: Very good. And we will have—I will only mention these instructions, because we will have our instructions ready.

The Court: Prepare such instructions as you have.

Mr. Swanstrom: —during the noon recess.

The Court: I don't know whether we will get to the jury today or not. I am not strong about going to a jury at five or six o'clock in the evening and having a jury sit here all evening.

Mr. Ashenden: I agree with you, Judge.

The Court: I am inclined to put this over to Monday morning for argument, we will finish it out—

Mr. Swanstrom: Very good.

The Court: Then that gives the jury the daytime. I
485 don't like women to have to be going home at eleven or twelve o'clock.

Mr. Swanstrom: Very well, your Honor.

Mr. Ashenden: We are on your side, your Honor.

The Court: We will come back at two o'clock to complete the testimony.

Mr. Swanstrom: Very good.

(Whereupon a recess was taken until 2:00 o'clock p.m. the same day, April 12, 1957.)

486

* * (Caption—No. 54 C 1468) * *

Before Judge Perry
and a jury,
April 12, 1957,
2:00 o'clock p.m.

Trial resumed pursuant to recess.

Present:

Same as before.

(Whereupon the following proceedings were had in open court, in the presence and hearing of the jury:)

Mr. Swanstrom: I will ask the reporter to mark this Plaintiff's Exhibit 5, and I offer it in evidence.

The Court: It may be received.

(Said exhibit, so offered and received in evidence, was marked Plaintiff's Exhibit 5.)

487 Mr. Swanstrom: In order to elucidate the matter I am only going to use this witness after qualifying him to show what it would cost to put this plant into condition where it would satisfy for a license.

LOUIS A. ORZEHOSKIE, called as a witness herein on behalf of the Government, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Swanstrom.

Q. Will you give us your name, please?

A. Louis A. Orzehoskie.

Q. Where do you live, Mr. Orzehoskie?

A. 2151 Hawthorne Avenue, Melrose Park.

Q. What is your business or occupation?

A. I am a civil service employee of the Government in the Corps of Engineers.

Q. Is that the Corps of Engineers that has charge of the Arlington Airport?

A. We engineered the project.

Q. Have you any technical training in the matter of the equipment and apparatus used in private sanita-
488 tion systems where septic tanks are used, and so forth?

A. Septic tanks are only used for small installations.

Q. What has been your technical training in regard to acquiring knowledge relating to that, sewage systems, septic tank sewage systems?

A. I have had quite some experience with the Government. I have been an employee of the Government for 19 years as a civil engineer.

Q. During that time have you had occasion to examine and work with these septic tank sewer systems?

A. Yes. That is one of my functions in the Corps, is to design sewage disposal plants for Army installations and Air Force installations.

Q. Are you an engineer?

A. I am a professional engineer in the State of Illinois.

Q. And have you had any scholastic training?

A. I attended Polytech for three years in civil engineering.

Mr. Swanstrom: Is it necessary—

Mr. Ashenden: We will stipulate as to his qualifications as an engineer.

489 Mr. Swanstrom: Very well.

The Court: That will save further questioning along that line.

By Mr. Swanstrom:

Q. Did you examine the sewage system at Arlington Airport in 1954?

A. No. I did in 1953.

Q. 1953. Did you examine it after 1953 at any time?

A. Not the sewage disposal plant, no, sir.

Q. You did not examine it when you went there when the Army through the engineers took possession of the plant, of the entire Air Force?

A. I did prior to the time the Army took possession.

Q. How long prior? We took possession in October.

A. I don't know when we took possession, but I was there in November of 1953.

Q. November, 1953?

A. Yes, sir.

Q. Not after that?

A. No, sir.

Q. No?

490 A. I was there a month ago but I was never there between that time and—

Q. All right. You were not there close to the time the possession was taken?

A. No, sir.

Q. So you are testifying to the condition in November, 1953?

A. Yes, sir.

Q. Would you state as your opinion that the system was one that would need additions and corrections before it could satisfy as a satisfactory system to meet the test to obtain a state license for the operation of a trailer camp?

Mr. Ashenden: I object, if the court please. This man, as I understand it, is qualified to talk about restoration costs and not about licensing matters.

The Court: Well, he has not been called as an employee of the state and qualified as to whether he knows what the state would require. There is a little confusion in that. I originally thought he was called for the purpose of telling what reconstruction costs would be, or 491 the costs of alterations. I think you ought to ask him something about whether he knows what the requirements were at that time.

Mr. Swanstrom: I think there is no question about that. I think you are right about that, of course.

The Court: All right. Will you ask him those questions?

By Mr. Swanstrom:

Q. Do you know the minimum requirements of a plant of this kind to meet the sanitation requirements of the State Board of Health to obtain a license?

A. The State of Illinois would require—

Mr. Ashenden: I will still object, if the court please, because this still does not go to the question of the valuation of this leasehold and the question of whether or not

the state license could affect the value of the leasehold. There is no evidence to show that that has any effect at all with respect to this particular leasehold.

492 The Court: I think it might have some variation. Objection overruled. He may answer.

The Witness: The State of Illinois for new sewage disposal plants requires design capacity of 100 gallons per capita, that is 100 per day for each inhabitant.

The Court: For each trailer site?

The Witness: No, I am talking about individual—

By Mr. Swanstrom:

Q. Per capita?

A. Per capita.

The Court: People?

The Witness: People.

The Court: All right, just so we understand.

By Mr. Swanstrom:

Q. Then for 500, you can calculate I think, 500 people, how many gallons would be required?

A. Fifty thousand gallons.

Q. In 1953 what was the capacity of this plant?

A. 6600.

Q. 6600 gallons?

493 A. Of the septic tank.

Q. And it would have required fifty thousand gallons. Have you any—

Mr. Ashenden: I again object, if the court please. I believe that we have been told that the state license was effective in 1954 in April. This man is testifying about 1953, and I will ask that all of his testimony on this subject be stricken.

Mr. Swanstrom: There is no proof—we must assume that the plant went right along. There is no proof that this plant in its capacity was increased in the few months that it had to go from November to May, 1954.

The Court: Counsel, if I remember correctly, the witness this morning testified that he inspected it and it was pretty well in the same condition, and unless there is evidence to the contrary I will assume that it was in the same condition. However, there is a distinction, counsel is pointing out, that your inspection was in 1953. So
494 the jury is instrueted that the evidence before the jury shows—at least it is up to the jury as to what it means—but there is evidence before you that it continued in the same condition, and there is not any evidence to the contrary, that I know of, so we will have to relate his testimony to what it would have been in 1954, assuming that. It should have been asked on a hypothetical basis, but it is all right.

By Mr. Swanstrom:

Q. To raise this capacity from, we will say, 6600 to 7000, to 50,000 gallons, what would it have cost in 1954 to do that?

A. I would estimate—

Mr. Ashenden: I object for the same reason, if the court please.

The Court: Objection overruled. He may answer if he knows.

The Witness: I would estimate about $50,000.

Mr. Swanstrom: You may cross-examine.

495 *Cross Examination by Mr. Ashenden.*

Q. Is it not a matter of fact that the county requires 100 per unit per day, 100 gallons per unit per day?

A. I said on a per capita basis the State of Illinois—

Q. No, I don't think you understood my question. I said, does not the County of Cook in their licensing—not their licensing, but their ordinance, doesn't that require capacity of 100 gallons per unit per day?

A. It may be so. I made no reference to that.

Q. So that could be a little different, couldn't it, than 100 gallons per person per day?

A. Yes, that could be.

Q. And it could be that if the county had an ordinance which was directly controlling trailers, inside of Cook County, Cook County Public Health and the other people would be the persons in charge and would be the parties to inspect such trailer camps, wouldn't they?

A. I was talking about a new sewage disposal plant. The state requirements are 100 per capita.

Mr. Ashenden: Would your Honor instruct the
496 witness to answer my question, if the court please?

The Court: Will you answer his question? You have explained what you are talking about, but answer his question.

Read it again.

Mr. Ashenden: I will repeat the question.

Q. Isn't it true that if the county has a trailer ordinance too, relating to public health, which requires 100 gallons per unit per day, that this would control as far as the county's enforcement is concerned in this trailer camp?

A. I can't—

Mr. Swanstrom: If your Honor please, I must make an objection to this as not being proper cross examination. I refrained, in order not to encumber the record, from proving by my witness a violation even of the county ordinances. Therefore, I do not think it is proper to interrogate this witness about the county ordinances. He could have done that this morning and he could have proved my case as far as the county was concerned.
497 But I refrained from that, I did not think it was necessary.

Mr. Ashenden: We are showing, in other words, two different standards from the testimony that has been elicited.

Mr. Swanstrom: There is no testimony here as to the county—

The Court: It may stand for what it is worth.

By Mr. Ashenden:

Q. Did you hear the testimony this morning of Mr. DeJonge?

A. I did.

Q. You were sitting here in the court, weren't you?

A. Yes, sir.

Q. Didn't you hear him say 100 per unit per day?

A. I did.

Q. Isn't that a difference in the standard that the state and the county have then that you just testified to?

A. It sounds different, yes, sir.

Q. In fact, if you had about four people in each trailer, or even two people in each trailer, I think that is what the average—maybe two and a half people per 498 trailer is what I think DeJonge testified to, isn't that true?

A. Yes, sir.

Q. Then the capacity that is required by the state is two and one-half times larger on a gallonage basis than the county requires right now on two separate ordinances, isn't that true?

Mr. Swanstrom: This is entirely confusing.

The Court: Somebody testified about 2½ times—

Mr. Swanstrom: That the normal was 2½, but he did not testify as to 2½ out here.

The Court: As far as that is concerned it is a matter of—it is in the evidence. The evidence is in here as to what the requirement by the state is, and also as to the

county. It is not necessary to ask this witness as to whether or not they are different.

By Mr. Ashenden:

Q. Do you have any opinion, if there is a discrepancy between the county and state law, which would control?

Mr. Swanstrom: Well,—

499 The Witness: I have no legal opinion of that.

Mr. Swanstrom: I object to that.

The Court: He has no opinion. It is objectionable, but he has no opinion on it anyhow.

By Mr. Ashenden:

Q. Under these circumstances can you imagine in your experience a situation where somebody could be in violation of one and not of the other?

Mr. Swanstrom: I object to that.

The Witness: Well, we do it on an engineering basis, and how the laws are made up are not how we work. We are not governed by either the county or state laws. We design on an engineering basis.

By Mr. Ashenden:

Q. No, I am not talking about that. You were talking about what would violate the state law. I am asking you, on the basis of what testimony you have heard today, is it not conceivable in your experience that a party could be in violation of the state and not the county law under the same circumstances?

500 A. Well, I don't know if that is actually a violation of the state law, but that is the capacity that the state requires in new plants.

Q. In new plants?

A. In new plants.

Q. Don't they have a different setup for non-conforming, for other plants that were in existence?

A. I don't know.

Q. Don't you know what regulations they have with respect to—

Mr. Swanstrom: If the court please, I must object. Science has no regulation. He is talking about what is proper sanitation.

The Court: The witness has not testified and it now appears on cross examination that he is talking about what it would cost to put in what the state requires for a new plant. I think, in all fairness, the defendants have a right to ask the question now as to whether he knows whether or not there is a different regulation with respect to property that is already in existence, whether or
501 not when the law became effective, the regulating statute, in May of 1954, whether or not it required a completely new plant for all places that were in operation. I think he is entitled to know whether he knows about that. It makes a lot of difference. When laws are passed sometimes they give that kind of consideration.

Do you know whether or not it provided for such?

The Witness: No, I do not.

The Court: Whether the regulations make such provision?

The Witness: I do not.

By Mr. Ashenden:

Q. Your experience has been primarily during the 19 years that you have been connected with the Corps of Engineers, with Army installations, is that not true?

A. Yes, sir.

Q. And by that you refer to the installations that take place in connection with what, Army plants,
502 bases, and that type of thing? Isn't that true?

A. Yes.

Q. Depots?

A. Yes, sir.

Q. Generally speaking, what is the average size of a base for which you set up this type of a plant, and I mean population-wise?

A. In the Chicago area there are some fifteen sites that have population in the neighborhood of 200.

Q. I see. Do you also handle larger matters too?

A. Yes.

Q. Have you in the 19 years you have had experience?

A. Yes.

Q. Have you been in this area?

A. I have been in this area for 14 years.

Q. But to clarify it now, you were talking about what the state law usually requires in connection with putting in a brand new system, is that correct?

A. That is correct.

Q. And you do not talk about what the trailer 503 ordinances require, or anything like that, but you are talking about sewage systems alone?

A. Yes, sir.

Q. In your examination of the background of this matter, did you know during the war that this particular field, barracks particularly thereof, was used as a prisoner of war camp or site by the Navy?

A. I heard of it. I have no definite knowledge of it.

Q. You don't know for sure?

A. No.

Q. In other words, you don't know how many German prisoners of war were maintained on the base at that time?

A. No, sir.

Mr. Ashenden: That is all, thank you.

Mr. Swanstrom: That is all.

The Court: Witness excused.

(Witness excused.)

(A short recess was taken.)

Mr. Swanstrom: I want to state first, if the court please, the narrow area of this rebuttal testimony, and I want to make this statement before I put Mr. Mc-
504 Cahill on. It is chiefly for the purpose of meeting some of the legal analysis of Mr. Hartenfeld yesterday.

The Court: All right.

EDMOND C. McCAHILL, called as a witness herein on behalf of the Government, in rebuttal, previously duly sworn, was examined and testified as follows:

Direct Examination by Mr. Swanstrom.

Q. You were on the stand previously in this case, Mr. McCahill?

A. I was.

Q. You are with the Corps of Engineers?

A. I am.

Q. Of course, you have no interest in the subject matter of this lawsuit?

A. I have no monetary interest in this case whatsoever.

Q. In your work you have had to do with leases, I think?

A. Yes.

Q. Airport leases and other leases?

A. That is right.

505 Q. About how many leases have you negotiated and drawn?

A. Well, as I previously testified, I joined the Corps of Engineers, Division Office, in 1945. The first assignment I had was to negotiate approximately 157 leases with private owners of airports through our territory. Our territory consists of Wisconsin, Indiana and Illinois.

We negotiate for the Government in that respect for the Army, the Air Corps, Atomic Energy and various smaller bodies, and those 157 leases were for landing permits and other things.

During the course of my twelve and a half years with the Corps I have negotiated other and sundry leases. We have heard reference here to O'Hare Field being the biggest airfield in the world, and which I think it is right now. I negotiated the original transfer of that property to the City of Chicago, in which we then negotiated a lease with the City of Chicago, whereby they took over some of the property and we in turn leased some of their property. We have negotiated perhaps with the city alone on O'Hare, fifteen leases over the course of the years.

506 That is also true at Billy Mitchell Field, and that is true at Truex, that is true at practically the City of Gary, as another example. All of these muncipalities, large or small, Peoria, have some negotiations with the Government in regard to leases so far as airports are concerned.

I will limit my qualifications to just airport leases. Of course, we have out-leases and in-leases, and we have, like Mr. Hartenfeld testified, that we had approximately 4000 leases in a period of two and a half years.

Well, I would not consider drawing up a form and having somebody's signature on that and in every instance the same lease as being 4000 leases, I would consider that preparing one lease, because each of our leases, where we deal on this large scale, or even on small scales with these individual airports, brings up a different problem in every instance. That is in regard to the facilities they perform, say like gas, the tie-down facilities and hangar facilities; in other words, in order to

negotiate these leases I had to familiarize myself with
507 airport operations, and we had to do that in order to know what we were talking about and to produce in a lease the meeting of the minds required by the parties.

In addition to that, we had to appraise each of these properties under the Economy Act as it now exists and as it previously existed, the Government in leases over $2000 cannot lease for more than fifteen per cent of the worth of the property.

Q. Do you mean where the Government is the lessee?

A. Yes.

Q. Not the lessor.

A. That is right. That is the case. I am merely qualifying that to show that we have to have a thorough understanding of the value of the property we are dealing with and why we are dealing with it and what the direct result is.

So over a period of the years I have been with the Government I could not definitely state how many leases I actually negotiated and prepared myself, but I know I have got leases in the office, some of them as much as 56 pages and one of 70, smaller ones of 24, 25 pages being fairly common.

Q. Directing your attention to the expression of
508 the intent of the parties, will you state what the effect is of the recital or the whereas clauses of the lease, as distinguished from the body of the lease, the body being the part of the lease that contains the contracts, the agreements?

A. Well, if we are referring to this particular lease in question here,—

Q. Yes, let us refer to that.

A. And if I could please have the exhibit I think I could explain it more thoroughly.

When we say recital or preamble, we mean the, why, the purpose of this lease at that particular time, why it is entered into. In other words, it shows why the contracting officer of the Government and the other parties are entering into this lease, and it shows that this lease is in the best interests of the Government at that time.

This preamble here states all of those things. It says that it is in the best interests of the Government, it says that they want to hold this land for post-war use. That is all true.

You will notice here that before we come to the "Witnesseth," this lease is made between the United States
509 of America, represented by the Chief of the Bureau of Yards and Docks, and the Illinois Aircraft Services and Sales Company, Incorporated. The United States of America is the fee owner of this land, not the Navy Department, not the Army Department. The United States of America, represented by us, the people, they are the ones, and they have a duly elected—

Mr. Ashenden: I object, if the court please. He says, "represented by us." I believe the lease says, "represented by the Navy Department."

The Witness: The United States of America meaning us, I should have said.

Mr. Ashenden: Oh, I do not doubt that.

By the Witness:

A. Yes. All right, when we take a lease and try to interpret it, we take first the body of the lease. By that I mean we come through all these whereases and we go to the body of the lease. When we come to the body of the lease and we have clear clauses in there that cannot be misconstrued or are not ambiguous in any manner, that is governing, and, therefore, when it is clear, when
510 any part of the body of the lease is clear, that is the interpretation that has to be taken as to the facts of

the lease, because the courts have found people are not interested in this window dressing up here. They want to know what they promised to do and what the other party promised to do, and as long as that is clear and unambiguous it needs no interpretation.

In this lease a point in question seems to be in paragraph 14:

"It is understood and agreed that this lease will at all times be revocable at will by the Government"—

the Government, meaning the United States Government—

The Court: Just a minute, Mr. Witness. Just don't argue the case.

By the Witness:

A. I am sorry, your Honor.

"upon presentation of notice of cancellation to the Lessee, in writing, sixty (60) days prior to such termination, in the event of default with regard to the covenants and conditions of the lease or in event of
511 a national emergency and a decision by the Secretary of the Navy that such revocation is essential."

That language is clear, not ambiguous, cannot be misunderstood.

If it could be misunderstood then and only then can you go back to your preamble to make an interpretation. In other words, where the body of the lease is clear there is no necessity to go into the preamble. The preamble has no effect.

Where the two of them are in conflict with each other, which is apparent here, the body of the lease is the one that determines it, that is the law, that is the law that we said we would produce yesterday.

In this case there seemed to be some interpretation in connection with the preamble entirely, and they brought up this fact of Naval aviation.

In the lease itself, with all the documents attached to it, there is only the Government—I mean in the body of the lease, it says nothing of Naval aircraft or aviation, it says "Government" all the way through here.

512 There was brought up some question about paragraph 5. Paragraph 5 is now admitted from the lease as it is today by the amendment to the lease, of which there is a copy here and which the Government amended in paragraph 5, by which we had joint use of the barracks, was taken out, I mean which the Naval Department had joint use of the barracks. That is taken out. So there is not one instance here—

By Mr. Swanstorm:

Q. Let us not repeat, Mr. Witness. Will you look at the object clause, what I call the object clause, the reason, the business that can be conducted on the premises, according to this lease?

A. Yes.

Q. Will you look at that?

A. "does hereby grant, rent, lease and demise unto the Lessee, to be occupied and used as an airport, and for such other purposes as may be necessary or incidental thereto."

Q. In your opinion and in your experience would you say that the operation of a trailer camp such as this was would be incidental to that?

A. It certainly would not. It would have nothing to do with the operation of an airport.

513 The Court: While we are on that, in your opinion would the operation of this for a Nike site be in accordance with that provision?

The Witness: Well, I like to speak about the function of the Government, and I like—

By Mr. Swanstrom:

Q. Just a moment.

A. Yes.

Mr. Swanstrom: I don't quite understand the question. I would like to.

The Court: I just asked him if in his opinion that clause would cover the operation of a Nike site as well as an airport.

The Witness: Yes. May I answer?

Mr. Swanstrom: The Nike site business is not in that. The Nike site is being established by the Government, the owner of the land. It is not under the lease.

The Witness: I would like to clarify that. It has bothered me while I listened to the testimony here for the last week.

514 Contrary to the statement by the former witness, it is my belief—I don't know what the status of the Army of the Navy were in Washington, but I do know and I believe everybody here does know—

Mr. Ashenden: I object to what he believes everybody here knows.

The Witness: All right.

The Court: Objection sustained.

The Witness: I do know that in the Pacific theatre of war you might say Naval operation or Army operation, they were together, like this, one hand in another. They had to be. You cannot see a war picture of Okinawa—

Mr. Ashenden: I object.

The Witness: —or of the Marshall Islands—

Mr. Ashenden: He is talking about a unification act and not about—

Mr. Swanstrom: If he is talking about the judge's question—

The Court: He is talking about something else. Go ahead. Finish the examination.

515 The Witness: At the present time under the chain of command, the chain of command is in the Secretary

of Defense, under the direction of the Armed Services Committee of the Senate and the Congress—I mean of Congress. He in turn has delegated certain authority to the Secretary of the Army, the Secretary of the Navy, Secretary of Aviation. They in turn are merely subordinate to him.

Mr. Swanstrom: I think that is sufficient, your Honor.

The Witness: I think by that it is one individual—one group.

Mr. Swanstrom: I think that is sufficient.

Mr. Ashenden: If the court please, does he mean before the unification act or after?

The Court: Can you answer that question?

The Witness: Yes. I am talking as of now, with the understanding of course that by act of Congress there was a transfer made of agency.

Mr. Ashenden: After the unification act?

The Witness: There is nothing in this lease that 516 states that there cannot be a transfer from one agency to another, and merely that lease w s drawn to protect the individual.

Mr. Ashenden: I merely asked him if it was before or after the unification act.

The Witness: This lease was prepared before the unification act.

Mr. Ashenden: And you are now talking about after the unification act?

The Witness: Yes.

Mr. Ashenden: When you are talking about a breakdown between the officials, aren't you?

The Witness: Yes, that is right. That still would not preclude me—

Mr. Ashenden: I didn't ask you any more questions.

The Witness: All right, thank you.

Mr. Swanstrom: That is all.

The Court: Do you wish to cross examine?

Mr. Ashenden: Yes.

517 *Cross Examination by Mr. Ashenden.*

Q. Is this lease you did not have anything to do with the drafting of this lease yourself?

A. No.

Q. When was the first time you saw it?

A. I saw that lease, I procured it from the Department of the Navy sometime in 1953.

Q. I show you this language in here. It says:

"Now Therefore, in consideration of the foregoing," and ask you what that means in a lease.

A. That, as you say, and reading the other part and the covenants—

Q. "and of the covenants and agreements hereinafter mentioned."

A. Yes.

Q. Yes.

A. And the $7200. As I explained before, counsel, that again is merely window dressing. That is, you might say,—

Q. In your opinion is it window dressing?

A. That is right, in my opinion.

Q. Yes. This is not the opinion that you have to say everybody has, is it?

518 A. No. This is the opinion of the highest courts and that is as recited in the Wilson case, as recited in the Perry v. Perry case.

The Court: It is not my case.

By Mr. Ashenden:

Q. Does the court say it is window dressing?

A. The court has determined that that is the law. There is no—

Q. Does the court say that it is window dressing?

A. It says that this is what counts, the body of the lease.

Q. Does the court say that it is window dressing?

A. There are some other courts in other cases that say that, yes.

Q. What are those cases?

A. I do not have those here, but I have the one that says directly what my point is.

Q. That specifically calls whereas clauses and preambles window dressing?

A. I cannot put my finger on the case, but the main thought in back of it, can I—

Q. That is different. This is your language.

A. The main thought in back of it is that it is 519 merely to show why the parties are entering into a deal. The word "whereas" itself says that.

Q. I did not ask you a question.

A. I would like to help you out.

Q. You are on the witness stand, you are not to make a speech now. You stated before that if the body of the lease is ambiguous in any way, that is when you look to the preamble to get a determination, isn't that right?

A. That is right.

Q. I will ask you, where it says, the last portion of the same clause we are talking about, this is the so-called cancellation clause, "and a decision by the Secretary of the Navy that such revocation is essential," what does essential mean, essential for what?

Mr. Swanstrom: Read what comes before that.

The Witness: Exactly, it means what is necessary.

By Mr. Ashenden:

Q. For what?

A. For anything.

Mr. Swanstrom: Read what comes before that.

520 The Court: One at a time.

The Witness: In his interpretation.

Mr. Swanstrom: Just a minute. In order to be fair with the question he would have to read that a national emergency shall exist and the revocation be essential.

Mr. Ashenden: Do you want me to read the whole thing?

Mr. Swanstrom: No, just that the national emergency—

By Mr. Ashenden:

Q. In the event of default with regard to the covenants and conditions of the lease or in the event of a national emergency—

Mr. Swanstrom: Yes.

Mr. Ashenden: "and a decision by the Secretary of the Navy that such revocation is essential."

Q. I am asking you now, essential for what?

A. This means in his interpretation as an administrator, if he decides that that property is necessary to any need the Government might have, he can so declare it.

Q. Any need the Government might have?

521 A. Any need.

Q. But this is talking about what he thinks is essential.

Q. This is the Secretary of the Navy?

A. It is an administrative decision.

Q. But is it still the Secretary of the Navy, isn't it, who makes this decision?

A. That is true, because he had been appointed at that time. He was in control of that property. He was the agent of the Government at that time.

Q. This is the Secretary of the Navy, and the only other portion of this lease that talks about essential is when they talk about Naval aviation in the whereas clause, isn't it?

A. And what does it say there?

Q. Isn't that true?

A. It does not end up "essential." It says "essential to Naval navigation." That is what it means.

Mr. Swanstrom: Is that all?

By Mr. Ashenden:

Q. "—essential to Naval aviation"?

A. Yes.

522 Mr. Ashenden: Thank you very much. That is all. No more questions.

Redirect Examination by Mr. Swanstrom.

Q. The body of the lease does not say "essential to Naval aviation"?

A. It does not.

Q. Will you tell us whether or not it is usual or very often found in these Government contracts that a person or an officer, because an office is always there,—

A. In every lease—

Q. —is named as the person to make a decision.

A. That is true.

Q. And the Supreme Court has said that is perfectly proper?

A. That is perfectly proper.

Q. And the reason that we do not name an individual as a rule is why?

A. Because the individual might pass away, get out of the picture, resign from office.

Mr. Swanstrom: That is all.

523 The Witness: And the office is always there.

The Court: Is that all?

Mr. Ashenden: One more.

Recross Examination by Mr. Ashenden.

Q. This lease also provides that the Navy can cancel it in the event we are using it for any wrong purpose under the local law or anything, isn't that true?

Mr. Swanstrom: You have misstated the lease again.

The Court: Just a minute.

The Witness: Yes.

Mr. Ashenden: He just said it is true. He is the witness.

The Court: Just a second.

By Mr. Ashenden:

Q. Isn't that true?

Mr. Swanstrom: He can easily be caught by a misstatement.

The Witness: Just a moment.

The Court: Mr. Witness, will you wait until I have ruled on the objection?

524 The objection is what?

Mr. Swanstrom: That he has misstated the terms of the lease by saying that the lease can be cancelled by the Navy. It does not say that. It says the Government may cancel this lease. I wanted to stop the answer because it was a trap.

Mr. Ashenden: It was certainly not meant as a trap, and—

Mr. Swanstrom: Well, I wanted to correct you so it would not seem to be.

The Court: The jury has the question before it. Who is it who can cancel the lease, according to the terms thereof?

Mr. Ashenden: This is a good question, Judge. We believe the Secretary of the Navy can.

The Court: What does the lease say?

Mr. Ashenden: This question I am putting to this man is on this topic—

Q. You made a statement—

Mr. Swanstrom: Let's answer the judge's question first.

525 Mr. Ashenden: Do you want me to ask my questions or—

Mr. Swanstrom: No, let him answer the judge's question.

The Court: Just a moment. See if he cannot answer the question which I propounded. What does the lease itself say about who shall have the power to cancel?

Mr. Swanstrom: Here, your Honor, is the lease.

Mr. Ashenden: "a decision by the Secretary of the Navy that such revocation is essential."

Mr. Swanstrom: No, no, no.

The Witness: It says the Government may cancel.

Mr. Ashenden: That's right.

The Court: Just a minute. I want to hear it read to the jury from the lease.

Mr. Ashenden: "It is understood and agreed that this lease will be—"

Mr. Swanstrom: Wait a minute.

The Court: Wait a minute, counsel. Ask the witness to read where it is, and if he does not read where you think he should, then you can point it out.

526 The Witness: Paragraph 14 of the lease:

"It is understood and agreed that this lease will at all times be revocable at will by the Government"—

and here are the conditions,—

Mr. Swanstrom: Never mind that.

The Court: Who signed the lease?

The Witness: The lease is signed by the Illinois Aircraft and it is signed, "The United States of America by" Mr. Cochrane, "By direction of the Chief of the Bureau of Yards and Docks, acting under the direction of the Secretary of the Navy."

But it is signed by the United States of America.

Mr. Ashenden: He is not supposed to say any more.

The Court: You have answered the question. All I want you to do is to read what it says there.

The Witness: All right, sir.

The Court: And not to interpret it. I am going to let the jury interpret it, who actually signed it and who can—

527 Mr. Swanstrom: Let him read the first sentence of paragraph 1 as well.

Mr. Ashenden: May I continue with my recross examination, Judge?

The Court: Let us try to do this in the regular manner. You can have him on redirect examination when he gets through. Let us get this over now. I think we are spending too much time on it.

By Mr. Ashenden:

Q. You stated that you thought the operation of the trailer park was not that kind of an operation that could be conducted under the terms of this lease, is that right?

A. I say that if so elected by the Navy Department who is in charge of the thing, they could have stopped the operation, yes.

Q. But they didn't?

A. They didn't so elect. They didn't have to. They just didn't elect to.

Q. How do you know what they had to do?

The Court: Just a second. Let us finish this up. He has answered the question. Now do you have another question?

528 Mr. Ashenden: No, that is all, Judge.

The Court: Do you have any redirect examination?

Mr. Swanstrom: Oh, I was just answering your Honor's question, to let him read the first sentence of paragraph 1 of the body of the lease.

Redirect Examination by Mr. Swanstrom.

Q. Will you do that?

A. This is paragraph 1 of the body of the lease:

"This lease may be terminated by the Government as hereinafter provided."

Mr. Swanstrom: I don't know whether this last question confused the situation.

Q. I think you stated your opinion was that running this trailer camp was not incidental to the—

A. That is true.

Q. —running of this airport as demised?

A. That is true.

Mr. Swanstrom: That is all.

Mr. Ashenden: That is all.

The Court: Witness excused.

(Witness excused.)

529 Mr. Swanstrom: The Government rests.

Mr. Ashenden: I have one witness in surrebuttal for two questions.

The Court: All right.

Mr. Ashenden: We are not going to go into the lease or anything about the lease. We have covered that already adequately.

The Court: But be sure it is surrebuttal, because we must conclude this.

Mr. Ashenden: It will be that.

LEONARD HARTENFELD, called as a witness herein on behalf of defendants, in surrebuttal, previously duly sworn, was examined and testified as follows:

Direct Examination by Mr. Ashenden.

Q. Will you state your name?

A. Leonard Hartenfeld.

Q. You previously have been sworn to testify in this case?

A. Yes.

Q. You heard the testimony this morning of Mr. DeJonge?

A. Yes.

530 Q. He was from the Public Health Department of Cook County, I believe.

In 1948, 1950 and 1952, after inspections were made by the county or state officials in connection with the sanitation condition, were any procedings instituted for any alleged violations, if any, of any, rather, county or state regulations?

A. No, sir.

Mr. Swanstrom: If the court please, I think this is not surrebuttal and I believe it is immaterial.

The Court: It is not surrebuttal, because that has already been established beforehand that there had been none.

Mr. Ashenden: Well, not in connection with these particular dates, if the court please.

The Court: There has been none at all, according to the evidence, so that would include all dates.

The Witness: That is correct, sir.

The Court: It is not harmful, but it is duplication and I am just trying to bring the case to a conclusion.

531 Mr. Swanstrom: That is all I want to do too, Judge.

The Court: All right.

By Mr. Ashenden:

Q. As a result of the fact that you were operating this lease on Government property, did you have any kind of immunity from any of the sanitation laws or regulations of the county or state?

A. No, sir. On sanitation we were subject to the jurisdiction of the Public Health authorities of the county, and under the cancellation clause of the lease the lease could be cancelled if we were not in sanitary condition at all times, and we leaned over backwards to have a decent, good operation, and—

Mr. Swanstrom: Now, I object to that.

The Court: Objection sustained.

Mr. Ashenden: That is the only point I wanted to cover.

The Witness: I am sorry.

The Court: It may be stricken. As a matter of fact, this is also duplication. This establishes the same thing, that there was no immunity.

532 The Witness: If the court please, if I could finish the answer to the question,—

Mr. Ashenden: He has not finished his answer.

The Court: You may finish your answer.

The Witness: All right. The point that has not been brought out to date in this trial—

Mr. Swanstrom: That would not be surrebuttal, your Honor.

The Witness: "Clearly" is the word I started to say, is that the sanitation facilities which we are discussing consisted of a sewage sand gravel bed,—

Mr. Swanstrom: I object, your Honor. There is nothing—

The Witness: —which was located approximately a block and a half, a city block and a half northwest towards the Arlington Race Track, northwest of the hangar. We picked you up at the large race track and drove towards the airport in the direction towards the Arlington Race Track, about a block and a half, a

533 city block and a half away from the hangar, northwest side of the hangar, was located this particular

thing that has been discussed so much in this trial, the sewage treatment plant. All the connections into this treatment plant, into the trailer park and the barracks, were all closed pipes underground that went from this treatment plant through past the hangar and then you walked from the hangar to the barracks and we had coffee where the trailer park was, all that pipe, which is a good long distance,—

Mr. Swanstrom: If the court please, how could I meet this kind of conversation?

The Witness: We are trying to make a very important point, your Honor.

Mr. Swanstrom: Well, it should have been made before.

The Witness: This is rebuttal.

The Court: The impression was left that it was all open, and that is proper surrebuttal, to bring out that there were pipes underground. I got the impression—
534 I was not out there, but I got the impression it was all open, and if the witness has evidence to the contrary he may answer in that form.

The Witness: That is right.

Mr. Swanstrom: Their own evidence is that it was tiled. We have not said that there was not a tile.

Mr. Ashenden: If the court please,—

The Court: You are correct. Your witness did not state that, but I, listening to it and not having seen any of it, had the impression from the testimony concerning what was in the ditches and so on, that it was open. Just where was it open and where was it closed, is proper surrebuttal testimony and the witness may tell that.

By Mr. Ashenden:

Q. In other words, from this trailer facility and from the barracks it was closed pipe all the way out to

the other side of the hangar, some two or two and a half blocks distance—

A. No. About a block or a block and a half, city block and a half.

535 Q. No, I mean to the hangar, and then another block and a half out to where this field and where this tank was, is that right?

A. Yes, sir.

Q. And from there where did it flow, where did this effluent that they spoke about, where would that congregate, if and when it did?

A. The only point that was open was that this end of a block and a half northwest of the hangar, which was about two and a half blocks or more from the trailer park and barracks. Where this open section was it was so far removed that nobody could possibly even have an odor from this sewage. As far as the hangar or the barracks or the trailer park, there was absolutely no odor. There was absolutely no danger to health. The only problem that we had during the whole time we were out there, was discussed—

Mr. Swanstrom: If the court please, I submit—

The Court: Objection sustained. We have gone far enough. I allowed you to testify as to the closed portion of it, and as to the rest of it the objection is sus-

536 tained.

Mr. Swanstrom: My witnesses are gone, I cannot—

The Witness: If the court please,—

The Court: Objection sustained.

Mr. Ashenden: Just a minute now.

I believe that is all.

Cross Examination by Mr. Swanstrom.

Q. One question of law between you and me and the fence post, as they say, if a lease has a prohibition in

it or if it says you can run the business for this purpose and someone, the tenant, runs it for a purpose not included, the landlord collects rent, the landlord cannot object so as to put the tenant out—

The Court: Counsel, that is beyond his surrebuttal testimony.

Mr. Swanstrom: No, no, if the court please. He has stated that there had been no cancellation—not exactly that, but the same thing.

Mr. Ashenden: He did not say any such thing
537 at all, Judge. I do not think this is proper.

Mr. Swanstrom: I am getting a little weary, but I will withdraw that because it is not consequential enough.

The Witness: I would be very happy to answer that question.

The Court: We would then be getting back into the—

Mr. Swanstrom: No, I don't want to do that.

The Court: His testimony, as I understand it, is confined to this problem of open and underground pipes.

The Witness: Except, your Honor, I have not been able to finish a very important point about the open part.

Mr. Swanstrom: If it is understood that that is all his testimony goes to, it is all right, but I have forgotten what the thing was now, I can't keep notes because I can't write, and I will pass the thing and withdraw the question.

The Court: If there is any question in your mind
538 we will have the court reporter go back and read it.

Mr. Swanstrom: No, no. It would take too long and I do not think it is anything but a pure question of law, and I do not think we should have done all of this anyway.

The Court: I think we have covered it.

Mr. Swanstrom: I withdraw it.

The Court: All right. Witness excused.
(Witness excused.)

The Court: Does that conclude all the testimony?
Mr. Ashenden: Yes, we rest completely.
The Court: All right, both sides have rested.

(Thereupon an adjournment was taken until 9:30 o'clock a.m., Monday, April 15, 1957.)

539

(Caption—No. 54 C 1468)

Before Judge Perry
and a jury,
April 15, 1957,
9:30 o'clock a.m.

Trial resumed pursuant to adjournment.

Present:
Same as before.

(Whereupon the following proceedings were had in open court, out of the presence and hearing of the jury:)

Mr. Swanstrom: At this time, if your Honor please, I want to make, on behalf of the Government, a motion for a directed verdict of no dollars and no cents compensation.

The Court: Motion denied.

Mr. Ashenden: I think Mr. Hartenfeld will probably present our point of view as to the instructions.

540 The Court: We will have instructions presented by each side.

(Whereupon plaintiff tendered instructions 1 to 12, inclusive, with the request that each and all of

said tendered instructions be incorporated by the court in his charge to the jury, as follows:)

PLAINTIFF'S TENDERED INSTRUCTION NO. 1:

You are instructed that any improvements on the property and installation costs thereof, whether placed thereon by the defendant or by the Government are to be considered only insofar as such improvements may enhance the value of the defendants' interest, if any, in the premises as a tenant.

PLAINTIFF'S TENDERED INSTRUCTION NO. 2:

You are instructed that the present money value of a leasehold interest is the present value of the residue of the term yet to run with reference to the most valuable use or uses to which the same may be lawfully put and which use or uses are permissible by the terms of the lease; that is, what would be its present money worth over and above the obligations of the lease (as of 541 10/6/1954) to an assignee or purchaser willing and able to assume and perform the obligations of the lease for such residue of the term, if any, left to run.

PLAINTIFF'S TENDERED INSTRUCTION NO 3:

You are instructed that the value of the use made by the defendant of the land and buildings for a trailer camp and grammar school cannot be considered in arriving at just compensation in this case.

PLAINTIFF'S TENDERED INSTRUCTION NO. 4:

You are instructed that the lease in evidence between the parties is a valid agreement; that it provides that the Government has the right to revoke the lease upon

giving lessee 60 days written notice of cancellation under the conditions set forth in paragraph 14 thereof, namely in the event of a national emergency and a decision by the Secretary of the Navy that such revocation is essential.

PLAINTIFF'S TENDERED INSTRUCTION NO. 5:

You are instructed that in determining the fair cash market value of the leasehold rights, if any, which the Government took from the defendant you may consider
the terms and conditions of the lease which is in evi-
542 dence, including the right in the Government as lessor
to cancel the lease on 60 days' notice under the conditions set forth in the lease and also any restrictions as to the use of the premises by the lessee; that defendants' legal rights in the premises are defined and limited by the provisions of the lease in evidence.

PLAINTIFF'S TENDERED INSTRUCTION NO. 6:

In determining the just compensation to be made to the defendant in this case you must find the value, if any, of the rights the defendant had to remain in possession of the premises in question and the conditions under which it could remain in possession by giving effect to each and every provision in the lease which had been executed by the parties and which is in evidence and also, you must give effect to the other documents in evidence relating to such possession, in other words you should take into consideration the effect of any provision in the said lease and other documents which may affect the saleability of such lease in arriving at the amount of compensation, if any, which should be made for taking possession of the premises by this proceeding.

PLAINTIFF'S TENDERED INSTRUCTION NO. 7:

You should not be swayed by emotion, prejudices,
543 sympathy or any appeals to your feelings. You should not be swayed in any way by the question of the source of the money necessary to pay for the property taken.

Your verdict must be based upon the evidence admitted in this case.

PLAINTIFF'S TENDERED INSTRUCTION NO. 8:

Fair cash market value means the sum of money for which the property could be sold, if offered for sale, in an open market by an owner, who is ready, willing and able to sell, to a person, who is ready, willing and able to buy, for cash or terms equivalent to cash, within a reasonable time, neither of whom is under any compulsion to sell or buy.

PLAINTIFF'S TENDERED INSTRUCTION NO. 9:

You are instructed that the Government in this case need pay only for what it took, if anything, from the defendant and therefore you shall consider what effect the various conditions, terms and restrictions in the lease would have on a purchaser of the leasehold in arriving at fair market value at the time of the taking of possession which has been fixed as of 10/6/1954.

Defendant is not entitled to compensation for any-
544 thing which it did not have when the Government went into possession.

PLAINTIFF'S TENDERED INSTRUCTION NO. 10:

You are the sole judges of the credibility of the witnesses. It is your duty to determine where lies the pre-

giving lessee 60 days written notice of cancellation under the conditions set forth in paragraph 14 thereof, namely in the event of a national emergency and a decision by the Secretary of the Navy that such revocation is essential.

PLAINTIFF'S TENDERED INSTRUCTION NO. 5:

You are instructed that in determining the fair cash market value of the leasehold rights, if any, which the Government took from the defendant you may consider
the terms and conditions of the lease which is in evi-
542 dence, including the right in the Government as lessor
to cancel the lease on 60 days' notice under the conditions set forth in the lease and also any restrictions as to the use of the premises by the lessee; that defendants' legal rights in the premises are defined and limited by the provisions of the lease in evidence.

PLAINTIFF'S TENDERED INSTRUCTION NO. 6:

In determining the just compensation to be made to the defendant in this case you must find the value, if any, of the rights the defendant had to remain in possession of the premises in question and the conditions under which it could remain in possession by giving effect to each and every provision in the lease which had been executed by the parties and which is in evidence and also, you must give effect to the other documents in evidence relating to such possession, in other words you should take into consideration the effect of any provision in the said lease and other documents which may affect the saleability of such lease in arriving at the amount of compensation, if any, which should be made for taking possession of the premises by this proceeding.

PLAINTIFF'S TENDERED INSTRUCTION NO. 7:

You should not be swayed by emotion, prejudices,
543 sympathy or any appeals to your feelings. You should not be swayed in any way by the question of the source of the money necessary to pay for the property taken.

Your verdict must be based upon the evidence admitted in this case.

PLAINTIFF'S TENDERED INSTRUCTION NO. 8:

Fair cash market value means the sum of money for which the property could be sold, if offered for sale, in an open market by an owner, who is ready, willing and able to sell, to a person, who is ready, willing and able to buy, for cash or terms equivalent to cash, within a reasonable time, neither of whom is under any compulsion to sell or buy.

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Defendant is not entitled to compensation for any-
544 thing which it did not have when the Government went into possession.

PLAINTIFF'S TENDERED INSTRUCTION NO. 10:

You are the sole judges of the credibility of the witnesses. It is your duty to determine where lies the pre-

ponderance, that is, the greater weight of evidence in this case. The preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of evidence is, you may take into consideration the number of witnesses testifying to a particular fact or state of facts; and you may also take into consideration, so far as shown by the evidence, the opportunities of the several witnesses for seeing, knowing and understanding the things about which they testify, (their apparent intelligence or lack thereof); their appearance, conduct and demeanor while testifying, their interest or lack of interest, if any, as shown by the evidence, in the result of the suit; the probability or improbability of the truth of their several statements, in view of all the evidence, facts and circumstances proved on the trial; and from all these facts and circumstances, and from a full consideration of all the evidence, determine upon which side is the 545 greater weight or preponderance of the evidence.

PLAINTIFF'S TENDERED INSTRUCTION NO. 11:

You are instructed that where the body of the lease in evidence is not ambiguous, viz.: where the meaning thereof is not uncertain, the body of the lease controls and there is no need to refer to the "whereas" clauses or "preamble" in construing said lease, and further, that in such instance, that is where there is no ambiguity in the body of the lease, but there may be some language in the "preamble" or "whereas" clauses which might be said to be in conflict with the provisions of the body of the lease such language in the "preamble" or "whereas" clauses are not controlling and may be ignored in construing the meaning of the lease.

You are further instructed that the lease speaks for itself and the intention of the parties is to be determined from the writing itself and in determining such intention of the parties to this lease you must look to the provisions given and taken on behalf of each party thereto.

PLAINTIFF'S TENDERED INSTRUCTION NO. 12

You are instructed that if you believe that the operation of the trailer camp as shown in this case was not
546 property within the purpose for which the property was leased to the defendants, viz.: to be occupied and used as an airport, and for such other purposes as may be necessary or incidental thereto and, therefore, would give the lessor of such the right to notify the lessee to stop such use of the leased premises. The mere fact that the lessor accepted rent with knowledge of such noncompliance with the lease, was not a bar to the lessor's right to insist upon compliance with the lease thereafter.

(Whereupon defendant Illinois Aircraft Services and Sales Company tendered instructions A to T, inclusive, with the request that each and all of said tendered instructions be incorporated by the court in his charge to the jury, as follows:)

DEFENDANTS' TENDERED INSTRUCTION A:

The Court instructs the jury that the hypothetical willing buyer who is assumed to have purchased the lease from Illinois Corporation on October 6, 1954 did so not knowing anything about this condemnation suit and not knowing about any plans of the Army to use the property
547 covered by the lease for a Nike site. Such willing buyer would know that Illinois Corporation had been in undisturbed possession of the property under the lease since May 1, 1947.

DEFENDANTS' TENDERED INSTRUCTION B:

The Court instructs the jury that the property covered by the lease is unique property. The jury is entitled, therefore, to take into consideration any and all evidence reflecting upon the fair market value of the lease as of October 6, 1954, including the nature and extent of the property, buildings and improvements, their location, their adaptability and capacity for aircraft sales, flight instruction, aviation gas and oil sales, aircraft rentals, hangar and tie-down rentals, maintenance and repair to aircraft, sale of aircraft parts, and any other aviation uses, and their adaptability and capacity for trailer park and barracks apartment housing, and the earnings of the Illinois Corporation and the testimony of experts concerning the highest and best then existing and potential earning capacity of the property, buildings and improvements, regardless of whether the Illinois Corporation was actually engaged in all of such activities on October 6,
548 1954, and the scope of aircraft sales, flight instruction and other private aviation business, and trailer parks and barracks housing during the period beginning October 6, 1954 and ending May 1, 1957, as could be foreseen by a reasonably prudent business man engaged in the private aviation business, trailer parks and barracks apartment housing as of October 6, 1954.

DEFENDANTS' TENDERED INSTRUCTION C:

The Court instructs the jury that when the jurisdiction over the property covered by the lease was transferred to the Army by the Navy on May 5, 1954, the Army acquired no greater rights in the property than the Navy had previous to the transfer, and the Army was bound by the same terms of the lease as was the Navy, insofar as the Illinois Corporation was concerned.

DEFENDANTS' TENDERED INSTRUCTION D:

The jury are instructed that if the preamble, or preliminary recitals, of a lease are clear and the body is not clear, the preamble controls the meaning of the entire lease.

DEFENDANTS' TENDERED INSTRUCTION E:

The jury are instructed that where a lease contains unclear words, the lease is to be construed against the lessor, or landlord.

549 DEFENDANTS' TENDERED INSTRUCTION F:

The jury are instructed that a lease must be construed most strongly against the party who prepared it.

DEFENDANTS' TENDERED INSTRUCTION G:

The jury are instructed that the fact that Illinois Corporation had no trailer park license from the State of Illinois or Cook County is of no importance because such licenses could not be obtained for a trailer park on Federal land, and the lack of such licenses did not affect the fair market value of the company's lease, with the Navy.

DEFENDANTS' TENDERED INSTRUCTION H:

The jury are instructed that the right to possession of property covered by a lease, and the lease itself, are property which are protected by the Fifth Amendment to the United States Constitution. The Fifth Amendment commands that such property shall not be taken by the Army unless just compensation is paid to the tenant.

The jury are further instructed that the rights of a private company against the Army arising out of a lease with the Navy are protected by the Fifth Amendment.

DEFENDANTS' TENDERED INSTRUCTION I:

The court instructs the jury that this lease has not been cancelled.

The jury is further instructed to disregard any and all statements by counsel or witnesses suggesting anything to the contrary.

DEFENDANTS' TENDERED INSTRUCTION J:

The court instructs the jury that the legal effect of the entire lease is a matter of law to be decided only by the court.

DEFENDANTS' TENDERED INSTRUCTION K:

The court instructs the jury that, for the purpose of determining just compensation, you must consider the lease to be in full force and effect for the period of two years and eight months, from October 6, 1954, through May 1, 1957.

DEFENDANTS' TENDERED INSTRUCTION L:

The jury is further instructed that the lease could not be cancelled unless the Secretary of the Navy made a decision during a national emergency that the property covered by the lease would be essential for purposes of naval aviation.

DEFENDANTS' TENDERED INSTRUCTION M:

The court instructs the jury that the present use by
551 the Army of the property in question is not a Naval Aviation use of the property within the meaning of the lease.

DEFENDANTS' TENDERED INSTRUCTION N:

The jury is further instructed that they may not speculate or infer from the fact that the Illinois Corporation is no longer in possession of the premises, that the lease involved was or had been cancelled.

Furthermore, the fact that the Army is now using the property for defense purposes shall not effect your determination of the fair market value of this leasehold as of October 6, 1954.

DEFENDANTS' TENDERED INSTRUCTION O:

In determining just compensation the jury shall decide what the fair market value of the condemned leasehold was on October 6, 1954. This means what amount a willing buyer would pay a willing seller on October 6, 1954, for the two years and eight months period expiring on May 1, 1957, of Illinois Corporation's lease covering the property, which includes the airport, the trailer park and barracks. You must assume that such a willing buyer would not know of this condemnation suit or any threat thereof.

You must also assume that such a willing buyer would 552 understand that the lease could not be cancelled unless the Secretary of the Navy made a decision during a national emergency that the property covered by this lease would be essential for purposes of Naval aviation. You must also assume that the willing buyer would pay for this two year eight months leasehold interest an amount which would be based upon the highest and best existing and potential uses to which the airport, trailer park and barracks could be put.

DEFENDANTS' TENDERED INSTRUCTION P:

The jury is instructed that the lease between the Navy and Illinois Corporation is the same as any other lease

between two private citizens, and that both the Navy and Illinois Corporation are equally bound by the terms of the lease.

The jury is further instructed that when jurisdiction of this property was passed to the Army, the Army thereupon became equally bound by the lease, as was the Navy.

DEFENDANTS' TENDERED INSTRUCTION Q:

The court instructs the jury that the Constitution of the United States provides that no person shall "be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without 553 just compensation."

The court instructs the jury that the lease between the Illinois Corporation and the Navy is private property within the meaning of the Constitution, and that therefore the Illinois Corporation cannot be deprived of its lease by the Government without just compensation being awarded to Illinois Corporation.

DEFENDANTS' TENDERED INSTRUCTION R:

The court calls the jury's attention to the fact that the Government did not introduce any evidence at all concerning the fair market value of the two year eight months leasehold interest to a willing buyer who knew on October 6, 1954, that the lease could not be cancelled unless the Secretary of the Navy made a decision during a national emergency that the property covered by the lease would be essential for purposes of naval aviation.

The only evidence on this point was that of the Illinois Corporation's witnesses, and therefore the only evidence you may consider is the testimony of Illinois Corporation's witnesses and such exhibits as have been introduced into evidence.

DEFENDANTS' TENDERED INSTRUCTION S:

554 The court instructs the jury that the property covered by the lease is unique property. The jury are entitled, therefore, to take into consideration any and all evidence, including the earnings of the Illinois Corporation and the testimony of experts concerning existing and potential earning capacity of the property, for the purpose of determining the fair market value.

DEFENDANTS' TENDERED INSTRUCTION T:

You are instructed that the jury is the sole judge of the facts in this case, the credibility of the witnesses and of the weight to be given to their testimony. On the other hand, the court is the sole judge of the law in this case, and it becomes the duty of the jury to follow the law as it is given to it by the court in his instructions. You have no right to disregard the court's instructions. The instructions given to the jury by the court must be accepted by them as the law governing the case, regardless of their personal feelings as to what the law should be. The jury will not be justified in finding a verdict contrary to the law as laid down in the instructions.

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555 The Court: I have in front of me certain instructions here that I have gone through and that we can save some time on.

I believe instructions Nos. 1, 7 and 10, as offered by the Government have not been objected to, and if there are objections to those three instructions you may now make them for the record, and let the record show that this is the time the court has set apart for the preserving in the record of the objections to any instructions tendered by either side and for the tendering of instructions by each

side, to be preserved in the record for the right of appeal.

Are there any objections to instructions 1, 7 and 10, as tendered by the Government?

Mr. Hartenfeld: Your Honor, the defendants have no objection to instructions 10 or 7.

The Court: They will be given.

Mr. Hartenfeld: As to instruction No. 1, however, we object to only two words in that instruction, the words "if any," after the words "defendants' interest."

There are a lot of cases which say that by putting in the words "if any" in an instruction, it is a very
556 strong and peremptory instruction to the jury that there may not be any interest. It is a little misleading, in our opinion, to put the words "if any" in there. Otherwise we have no objection to instruction No. 1.

Mr. Swanstrom: The instruction is taken directly from a case that went up.

Mr. Hartenfeld: Perhaps in that case they did not raise the point. Here we do raise it.

Is there any objection, Mr. Swanstrom, to taking out the words "if any"?

Mr. Swanstrom: It is up to the court.

Mr. Hartenfeld: The instruction is all right otherwise.

The Court: I think I will remove those words in this particular case.

Mr. Hartenfeld: Very well.

The Court: The instruction No. 1 will be given as is, with the words "if any" stricken.

Do you have any objection to instruction No. 2?

Mr. Hartenfeld: Your Honor, we have another instruction which I think is preferable over this.

The Court: Which of your instructions do you refer to?

Mr. Hartenfeld: I refer to instruction B.

557 The Court: Very well. Gentlemen, will you look at instruction B,—

Mr. Swanstrom: I have looked at it, and this does not cover the thing at all. This was taken up in a case which went to the Court of Appeals for this circuit.

This instruction B for defendants goes into particularities that confuse the instruction. The instruction is very simple, the one we have tendered, as drawn.

If this instruction of the defendants is to be given or is offered later, the court can then pass on it. I maintain the plaintiff's instruction should be given as is.

The Court: Will counsel for the Government look at defendants' instruction B and state if it has objection to it?

Mr. Swanstrom: I have, yes.

The Court: Will you state those objections into the record?

Mr. Swanstrom: That instruction is objectionable in that it does not indicate that the use that was made or that might be made was lawful. That is the first point.

558 The second point is that No. 2, that is an instruction actually to the effect that running a trailer park and barracks housing is a lawful use and a use permitted under the terms of the lease.

The Court: The objections to instruction No. 2 overruled, and instruction No. 2 will be given.

Objections by the plaintiff to defendants' instruction B overruled, and instruction B given.

Now we will go to plaintiff's instruction 3. Is there objection to that?

Mr. Hartenfeld: Your Honor, this instruction No. 3 is clearly incorrect so far as the law is concerned. We are entitled to have the jury consider the trailer park as one of the factors to be considered in determining value. This instruction No. 3 would preclude that from consideration by the jury completely. We object to that instruction, your Honor, very strenuously.

The Court: Are there any further comments by the Government?

Instruction No. 3 is refused.

Instruction No. 4.

Mr. Hartenfeld: Government's instruction No. 4 is objectionable to the defendants for a number of reasons.

The principal objection is that it is not an accurate
559 description of how the lease is to be handled.

Pardon me, your Honor. May I confer with my associate on this instruction for a moment?

The Court: Yes, you may.

Mr. Hartenfeld: Something struck me as I read it.

The Court: Well, the thing that struck me is that this instruction makes no reference to the use of the premises as an airfield by the Government in connection with the cancellation clause.

Mr. Hartenfeld: My associate heartily agrees with you, your Honor, on that point.

The Court: This instruction could be amended to include, if it is desirable, "essential for naval aviation," but in its present form—

Mr. Swanstrom: No, thank you.

The Court: I think in place of refusing it, the court on its own motion is going to amend that. "is essential for naval aviation."

Mr. Ashenden: Are you going to add those three words, your Honor, and then give it?

The Court: Yes.

Mr. Swanstrom: I object seriously to that and I hope the record will so state.

The Court: So far as I am concerned it would be
560 satisfactory for me if it even said "for aviation," because that is the spirit of it. I will strike the word "naval," and I will have it read "essential for aviation purposes."

Mr. Swanstrom: I still object to it. I object to the amendment made by the court.

The Court: It will be given with that amendment. The only words to be added after the word "essential" will be "for aviation purposes."

So the record may be clear, objection to instruction No. 4 is overruled and the instruction is given.

Mr. Swanstrom: Well, the instruction is given as amended, is it not?

The Court: As amended, yes. You are quite correct.

Mr. Swanstrom: Over the Government's objection.

The Court: So the record is doubly clear, the objection previously made by defendants, sustained. The court then amended the instruction by adding the words after "essential" at the end, "for aviation purposes." To that amendment the Government objected. That objection is overruled and the instruction as amended is given.

All right, now instruction No. 5.

Mr. Hartenfeld: If the court please, defendants 561 object to instruction No. 5 as being misleading to the jury when they use the words "restrictions as to the use of the premises by the lessee." Actually, there has been no violation of any restriction whatsoever, but there has been a lot of conversation off the record and inference to the jury by Government counsel, and this would completely mislead the jury if this language were included.

Mr. Swastrom: I have no objection if we can think of a word in place of "restrictions" because I am trying to refer to use in conformance with the lease.

Mr. Hartenfeld: If the court please, I do not believe that would cure it either.

Also the words "if any" in the second line are clearly objectionable. You have already ruled on that with respect to the other instruction.

This is a completely misleading instruction as it is worded.

The Court: Objection sustained, instruction refused.

No. 6.

Was this not covered in instruction No. 2 by the Government? Is this not essentially the same thing as instruc-
562 tion No. 2 except in different words?

Mr. Hartenfeld: The wording is much more objectionable, I believe.

The Court: This will be refused as being duplication. No. 6 is duplication of No. 2.

We will now take up No. 8.

Mr. Hartenfeld: This instruction, your Honor, I believe is objectionable. This would be taken from an instruction referring to a fee simple title of land, and I think this would be highly confusing to the jury.

Mr. Swanstrom: This is an instruction given in a great number of cases. I think this refers to the particular kind of property, but it is a general instruction as to market value and has been given time and time again with the approval of the Supreme Court as well as the intermediate courts.

The Court: I think this instruction is good, except I think we should say, "Fair cash market value means the sum of money for which the leasehold on the property—"

Mr. Hartenfeld: That is correct, sir.

The Court: I think the words "leasehold on the" should be inserted before the word "property."

As so amended it will be given.

563 Next will be instruction No. 9.

Mr. Hartenfeld: The defendants object to the words "if anything" in the second line of the instruction.

This instruction is redundant so far as telling the jury to again look back to the terms and restrictions in the lease. It has already been covered by other instructions.

The Court: This has already been covered. It is refused as duplicate.

Now No. 11.

Mr. Hartenfeld: If the court please, the first part of this instruction may not be bad, but it certainly is misleading without some language that we have in another instruction on the question of construing the preamble of the lease. I think they should be given together.

Mr. Swanstrom: This is a stock instruction, your Honor, and I do not know why we have to substitute his.

Mr. Hartenfeld: I refer to our instruction D.

The Court: Would you like your instruction D to be considered at this time?

Mr. Hartenfeld: Yes, your Honor, in connection with their instruction 11.

564 I object to your Honor giving them two methods of construing a lease.

Our instruction D is just the other side of the story from what the Government tenders in their instruction No. 11.

The Court: Do you think the law is that the preamble controls or that it may be taken into consideration?

Mr. Hartenfeld: Actually, the net effect in this case would be to control the whole lease. We have here a jury of laymen, and the proposition has been pounded at them so much in this trial, that I think the only fair instruction is the short one that we have given, our instruction D, together with Government's instruction 11, at least a part of it, the first sentence of their instruction No. 11. I think then the jury will understand it. Otherwise I think the jury might be completely misled.

Of course, in construing a legal document in certain cases you take together the body and the preamble. The federal cases are very clear that the preamble controls where the body is ambiguous.

Our instruction, your Honor, is a short statement of the law. There is no question but what it will clarify it in the minds of the jurors.

565 I believe the first part of the Government's instruction No. 11 is all right down to the words "and further." Up to that point I think it is a good statement of the law. But from there on I believe it gets very confusing to the jurors.

If you cut their instruction off after the words "said lease," in the fifth line, I think then it will be fair to both sides, if it will be taken together with our instruction D.

This, your Honor, is I believe the most important point in all of these instructions.

Mr. Swanstrom: The preamble would not necessarily dictate or control the entire lease.

The Court: I think the first part of instruction 11 is clearly the law:

> "You are instructed that where the body of the lease in evidence is not ambiguous, viz.: where the meaning thereof is not uncertain, the body of the lease controls and there is no need to refer to the 'whereas' clauses or 'preamble' in construing said lease."

I do not see any reason for the remainder of the wording and I will amend instruction 11 by striking the remaining part of it.

566 However, the second paragraph of it is good law, in my judgment.

Now, as to defendants' instruction D, I think a better wording of that would be:

> "The jury are instructed that if the preamble, or preliminary recitals, of a lease are clear and the body is not clear, the preamble must be taken into consideration in order to arrive at a correct interpretation of the lease."

I believe that is a proper statement of the law and I have accordingly amended instruction D, and I will give instructions 11 and D as I have indicated, and you may now make your objections to my proposal in that respect.

Mr. Hartenfeld: If the court please, we have no objection because I think we probably are using the same language. I just want to say that I took that from the case of Wilson v. Towers, 55 F.2d 199.

The Court: The instructions will be given as I suggested.

Now instruction No. 12.

Mr. Hartenfeld: I think this is clearly objectionable, your Honor. This again goes into the question of our
567 right to have a trailer park. This instruction is not only repetitious but, it is very damaging on this proposition.

Mr. Swanstrom: This instruction is based on the provisions of the lease.

Mr. Hartenfeld: We believe this is a peremptory instruction and directs the jury, and I think there is a lot of law on that.

The Court: What we are trying to do here is to evaluate what the leasehold is worth. Objection sustained as to instruction No. 12.

I believe there are certain of these instructions tendered by defendants which are not objected to by the Government. However, if the Government does have objections to make to them, they may do so. I refer to instructions N, Q and T.

Is there an objection to N at this time?

Mr. Swanstrom: No.

The Court: N is given.

Is there objection to Q?

Mr. Ashenden: If the court please, we have shortened

the title of the corporation here to Illinois Corporation, and we have not indicated in another general instruction that that would be what you are referring to in your instructions. Maybe there could be a note that you
568 are referring to the defendant corporation here when you say Illinois Corporation.

The Court: I will cover that.

Mr. Ashenden: All right.

Mr. Swanstrom: I do not like to object to this because it is substantially okay, except that the judge is telling the jury that this lease is property. That is one of the contentions in this case, and if we could avoid that thing—there is no question in my mind that a leasehold is property protected by the Constitution, but it does seem to me that this is rather telling the jury that—

The Court: I will put in "private property rights." I think there is something to what you say.

Mr. Hartenfeld: I think there is something to what you say.

The Court: A private property right.

Mr. Swanstrom: I do not think it reaches it.

The Court: Given.

Mr. Swanstrom: Given over my objection.

The Court: Objection preserved and overruled.

Now is there any objection to instruction T.

Mr. Swanstrom: Was my instruction refused where I talked about the interest of a witness may be taken into consideration on the question of credibility?

569 The Court: What number was that?

Mr. Hartenfeld: No. 10.

Mr. Ashenden: That was given.

Mr. Swanstrom: I have no objection to T.

The Court: All right, instruction T is given.

Now we will go to instruction E.

Mr. Ashenden: Did we cover instruction A, Judge?

The Court: You are correct.

Is there objection to instruction A?

Mr. Swanstrom: Don't you think, Judge, that the fact whether they have been in possession or not is determined by the evidence, and I don't see why you should say they have been. That is my only observation on it.

The Court: Up until May 1, 1947 they had been in undisturbed possession of the property.

Objection overruled. Instruction A will be given.

Instruction C is next. Is there any objection to C?

Mr. Swanstrom: No objection.

The Court: Instruction C is given.

Instruction E is the next one.

That is duplication, gentlemen. We already covered it.

570 Mr. Ashenden: Will you Honor consider instruction E together with instruction F?

The Court: Let us consider together instructions E and F. I think F covers both of them.

Instruction E is refused.

Now we will look at instruction F.

Mr. Swanstrom: I object to instruction F, your Honor.

The Court: Instruction F will be given as it is. Objection overruled. Next is instruction G. As to instruction G, I have already refused to go into the question of lack of license, and I do not know why it should be given in this one.

Mr. Hartenfeld: Your Honor, it is a fact that the lack of such licenses did not affect the fair market value of the company's leases with the Navy. That is a fact. There has been so much conversation about it, and I think the Government was at fault in saying some of the things they did about our license. Unless something is clarified in the minds if the jury we are going to be terribly

prejudiced on the fact that they did not have a trailer license which we could not under the law obtain, and that is all we are saying in this instruction. If the Govern-
571 ment had not brought in all of those things they did about that trailer license, and in a very unclear manner, may I say, we would not need this instruction.

The witness Enright testified that one of the things he took into consideration in fixing his opinion of value was the fact of an unauthorized use as a trailer park under the state and county law. Enright was absolutely wrong about that, there was no evidence of it at all, but he planted an idea in the minds of the jury which only you as the judge can get out of their minds. This is a correct statement of the law and I think we are entitled to it, Judge.

If we cover that in the argument, so far as the jurors are concerned we are just lawyers.

The Court: What is the position of the Government on that? Does the Government take the position that a license could be obtained on federal land?

Mr. Swanstrom: The Government takes the position that that has absolutely nothing to do with it, the fact that the Government happened to own the land. A lessee could obtain that license, and this instruction is definitely wrong for intimating anything contrary.

There is not any possible excuse in this case to
572 talk about the fair market value of the company's lease with the Navy. The Navy never made any lease with the company.

Mr. Hartenfeld: We will take out the words "with the Navy," if that is what is bothering Mr. Swanstrom.

Mr. Swanstrom: That is not the only thing that bothers me.

Mr. Ashenden: The only thing in the record on this license thing is our evidence that we could not obtain a

license. They have not shows that we could have obtained a license, and corroboration of that is the statement on cross examination of DeJonge, who said a similar situation is going on right now out at O'Hare Field, that a trailer camp is operating out there without a license and has been operating, and I asked him why and he said because it is on government property.

That is the only thing in evidence on that point, and now to say that the fact we do not have a license depreciates the value of the thing I think is really prejudicial. I think whether or not we had a license, that is not material on the question of market value of the property.

The fact is that they operated for seven and a half
573 years without such license.

Mr. Swanstrom: I do not believe the witness ever said he had any knowledge as to O'Hare Field, and that does not cover the situation at all. There is no evidence that O'Hare Field is leased to an individual, as is the case here. I object to this instruction.

The Court: I am concerned only with one thing. Are you positive the law is you could not obtain a license because it is on federal land?

Mr. Hartenfeld: Absolutely.

Mr. Ashenden: One of the prerequisites for obtaining a license is that the zoning is proper, and you cannot zone federal property.

The Court: Given. Objection overruled.

Now we will consider instruction H.

Is this not duplication of what you have already said?

Mr. Hartenfeld: It is, your Honor, except that I think the last part of that is very important, that this jury understands that the Army is standing in the shoes of the Navy on the question of the Fifth Amendment.

The Court: You may argue that. This will be refused as duplication.

574 I think it is a proper instruction but we have it covered sufficiently.

Next is instruction No. I.

Mr. Swanstrom: I object to that. There may be all kinds of things in the evidence to justify the jury in saying that this lease has ended. I do not believe the court is called upon to give that kind of an instruction, particularly where the court refused evidence on the matter of cancellation.

Mr. Hartenfeld: All through this trial, your Honor, there have been comments by counsel that this lease has been cancelled.

The Court: For the purpose of this record, for the purpose of this trial, this lease certainly is not cancelled. It must speak as of the day on which this proceeding was begun, October 6, 1954.

Objection overruled. Given.

Instruction J.

We have covered that sufficiently, have we not?

Mr. Hartenfeld: Yes.

The Court: Refused, duplication.

Now instruction K.

Mr. Swanstrom: Same objections as to the other instructions. It assumes that there is a lease, or it in-
575 structs the jury that there is a lease for the full period of two years and eight months, whereas, unless your Honor says—

The Court: Objection sustained. I think this goes too far. Refused. I think you sufficiently set forth what the facts are, conceivably after the date it could have been cancelled by the Navy for aviation purposes.

Mr. Hartenfeld: Your Honor, the only importance of this instruction, from our point of view, is to get the words "from October 6, 1954 through May 1, 1957," in the minds of the jurors, because we want to be certain that in determining fair market value they are talking about the right dates.

The Court: That is in here sufficiently.

Instruction L.

Mr. Swanstrom: This is objected to for the same reason as many of the others. It construes a lease—

The Court: Have we not covered this sufficiently?

Mr. Swanstrom: It construes the lease probably as something it is not.

Mr. Hartenfeld: This has the words "naval aviation."

The Court: This will be refused as duplicate. We have covered this sufficiently.

576 Instruction M. I will strike the word "naval", "is not Aviation".

Mr. Hartenfeld: Your Honor, just for the purpose of preserving the record, we object to your striking the word "naval".

The Court: Objection overruled. Is there any further objection?

Mr. Swanstrom: These instructions are almost impossible to object to, they are so general. The Government is using this for projecting aircraft. We do not know what the description of the missile is. At the moment I think it is missiles they are sending up. Self-propelled aircraft. We do not know what the Government may use this for tomorrow, and for the court to tell the jury that the use made by the Government of this field is not for aviation. I think just goes far beyond all sense of reason.

The Court: The court can only be governed by the complaint itself and the evidence here. I believe this instruction is sensible. Objection to instruction M is overruled and it will be given.

The next is instruction O.

Mr. Swanstrom: I object to that because it again defines that the lease runs for this period of two years
577 and eight months, instead of that the jury should be instructed to find the fair market value of this inter-

est, this leasehold, whatever you want to call it, as of that date.

Any other instruction that sews it down like this does would be objectionable.

Mr. Hartenfeld: Mr. Swanstrom, it merely says what a willing buyer would pay a willing seller on October 6, 1954—this is a correct statement of the law and states what we are entitled to receive.

Mr. Swanstrom: You are not entitled to say for two years and eight months.

Mr. Hartenfeld: That is exactly what the jury is to determine, is the value of the leasehold on—

Mr. Swanstrom: Then it goes on to say that it could not be cancelled unless the Secretary of the Navy made a decision, and there are these words "naval aviation" again. I can do no more than just object to it.

The Court: I think the objection to that latter part is good.

I will strike the last two sentences of the instruction as tendered, so that the instruction will end with the words "threat thereof."

Objection overruled as to that part of it, and the ob-
578 jections to the striking of the balance of it—are you objecting to my striking the last two sentences?

I think the instruction with the last two sentences deleted covers the point fairly.

Mr. Ashenden: This is a good statement of the law as to the highest and best existing and potential uses.

The Court: You are correct on that, but we do not need to repeat this "two years and eight months."

Mr. Ashenden: No.

The Court: I am willing to allow to remain in the instruction the sentence:

"You must also assume that the willing buyer would pay for this leasehold interest an amount which would

be based upon the highest and best existing and potential uses to which the airport, trailer park and barracks could be put."

I am willing to leave that part in. I will amend my original order and I will strike these words:

"And you must also assume that a willing buyer would understand that the lease could not be cancelled unless the Secretary of the Navy made a deci-
579 sion during a national emergency that the property covered by this lease would be essential for purposes of naval aviation."

We have covered all of that.

Mr. Hartenfeld: Yes. I agree with you, your Honor. I agree we have covered that in other instructions.

The Court: I am striking that, and I will leave in those words that I have here underlined as I have previously read them.

Does the Government object to it as amended?

Mr. Swanstrom: I object to it because it takes in the trailer park, for one thing, and you might say it is duplicitous as far as the highest and best use is concerned.

The Court: Objection overruled, and it is given.

Now let us go to instruction P.

Have we not had that second part? I think this has been sufficiently covered.

Mr. Ashenden: It seems to me I recall there has been one about transfer.

The Court: This will be refused as duplication. We have covered this.

Mr. Hartenfeld: All right.

580 The Court: Instruction R.

Do you object to instruction R?

Mr. Swanstrom: Certainly. Why should they criticize our evidence? We put in evidence as to the value of what

this defendant had. We did not have to put in evidence about their theory of the case.

The Court: Any further comments?

Mr. Hartenfeld: All this statement does is give an actual statement of fact.

The Court: It is argumentative. Refused. Instruction R is refused.

Next is instruction S.

Mr. Hartenfeld: We have covered this in another one. We will withdraw this one, your Honor.

The Court: Very well. Instruction S is withdrawn. Gentlemen, that covers the instructions.

Mr. Hartenfeld: In going over these instructions the point was raised that the jury might be confused by the word "lessee", as well as the phrases "Illinois Corporation" and "Arlington Airport." I am just wondering if your Honor could point out to them in your instructions that all these names mean us.

The Court: We can do that. All right.

581 There will be but one form of verdict; two forms, rather.

Do you have—

Mr. Swanstrom: I have not had time to get one up.

Mr. Ashenden: We do not have a form either, your Honor.

The Court: I will prepare the forms of verdict then.

Mr. Swanstrom: Will you do that.

The Court: All right.

(Thereupon a recess was taken until 12:45 o'clock p.m. of the same day, April 15, 1957.)

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• • (Caption—No. 54 C 1468) • •

Before Judge and a jury, April 15, 1957, 12:45 o'clock p.m.

Trial resumed pursuant to recess.

Present: Same as before.

(Whereupon the following proceedings were had in open court, in the presence and hearing of the jury:)

(Thereupon Mr. Swanstrom and Mr. Ashenden presented arguments to the jury in summation, the same not being transcribed.)

(Whereupon the court charged the jury as follows:)

583 The Court: Ladies and gentlemen of the jury, when you retire to your jury room the first thing you should do is to select a forewoman or foreman of the jury, in order properly to administer the taking of the ballots and handing the verdict over to the Marshal. That foreman or forelady has no more authority and no more jurisdiction, no stronger voice, than any other member of the jury. It is your own individual vote.

You will receive a form of verdict. You will not receive any of these written instructions. You will receive whatever exhibits are available and have been admitted for that purpose. Then you will be upon your own.

I would like to make this simple, but I cannot. But I do think I can help you in this respect, that it is very unusual for a jury to hear witnesses discussing law. In this case circumstances made it necessary because those witnesses were not discussing law for you, they were telling you the points of law—the appraisers, and so on—that a buyer would be considering. So whatever you heard

from the witness stand in the way of what the law is, that may be something someone might tell a buyer one way
584 or the other—you just disregard it, and you listen to these instructions here as being the law, regardless of what witnesses told you one way or the other. They were entitled, as the trial proceeded, to repeat, to read out of the lease and say some of the things that would have been presented to a buyer.

There is one other thing you will follow the instructions on—I will instruct you on it, but I think I sought to caution you. If this had been a matter of a piece of land where a man had an absolute title, like you do to your house, it would have been simple. In this kind of a proceeding the Government has a right to go in tomorrow, if it needs to, and take your house and dispossess you, if it needs it for vital defense, and then bring it up before a jury just like this, to find out, "What is the value of your house?"

You would not be able to show that you ought to have a certain amount of money because you were getting a certain amount of rent over a long period of time. You would have appraisers to say what that house was worth.

In arriving at what that house was worth they might
585 get some testimony into the record as to how much the rent was for that property and for other property.

So these matters that have gotten into the record concerning how much gross income or net income—I kept as much of that as possible away from you, so that we would not influence you, but there is some evidence here as to what the income might have been for the rest of the two years and eight months. That is not important. What would have been the fair cash market value of that lease to somebody fully aware of all the circumstances?

I have just tried to explain that to you. It will help you to follow these instructions a little better.

The court instructs the jury that the Constitution of the United States provides that no person shall "be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

The court instructs the jury that the lease between the Illinois Corporation—that is the defendant in this case
586 —and the Navy is a private property right within the meaning of the Constitution, and that therefore the defendant Illinois Corporation cannot be deprived of its lease by the Government without just compensation being awarded to the defendant Illinois Corporation.

There is just one defendant here, and if you have heard Illinois Aircraft, it is all the same thing. It may sometimes be referred to by its full name.

The court instructs the jury that the property covered by the lease is unique property. The jury are entitled, therefore, to take into consideration any and all evidence reflecting upon the fair market value of the lease as of October 6, 1954, including the nature and extent of the property, buildings and improvements their location, their adaptability and capacity for aircraft sales, flight instruction, aviation gas and oil sales, aircraft rentals, hangar and tie-down rentals, maintenance and repair to aircraft, sales of aircraft parts, and other aviation uses, and their adaptability and capacity for trailer parks and barracks apartment housing, and the earnings of the Illinois Corporation and the testimony of experts concerning the
587 highest and best then existing and potential earning capacity of the property, buildings and improvements, regardless of whether the Illinois Corporation was actually engaged in all of such activities on October 6, 1954, and

the scope of aircraft sales, flight instruction and other private aviation business, and trailer park and barracks housing during the period beginning October 6, 1954 and ending May 1, 1957, as could be foreseen by a reasonably prudent business man engaged in the private aviation business, trailer parks and barracks apartment housing as of October 6, 1954.

You are instructed that the jury is the sole judge of the facts in this case, the credibility of the witnesses and of the weight to be given to their testimony.

On the other hand, the court is the sole judge of the law in this case, and it becomes the duty of the jury to follow the law as it is given to it by the court in his instructions. You have no right to disregard the court's instructions. The instructions given to the jury by the court must be accepted by them as the law governing the case, regardless of their personal felings as to what the law
588 should be. The jury will not be justified in finding a verdict contrary to the law as laid down in the instructions.

You are instructed that the present money value of a leasehold interest is the present value of the residue of the term yet to run with reference to the most valuable use or uses to which the same may be lawfully put and which use or uses are permissible by the terms of the lease; that is, what would be its present money worth over and above the obligations of the lease as of October 10, 1954, to an assignee or purchaser willing and able to assume and perform the obligations of the lease for such residue of the term, if any, left to run.

The court instructs the jury that the hypothetical willing buyer who is assumed to have purchased the lease from Illinois Corporation, the defendant, on October 6, 1954 did so not knowing anything about this condemnation suit and not knowing about any plans of the Army to use the property covered by the lease for a Nike site.

Such willing buyer would know that Illinois Corporation, the defendant, had been in undisturbed possession of the property under the lease since May 1, 1947.

589 You are instructed that any improvements on the property and installation costs thereof, whether placed thereon by the defendant or by the Government are to be considered only insofar as such improvements may enhance the value of the defendants' interest in the premises as a tenant.

If I read something that appears to be a duplicate; I do not mean to duplicate it, but I have, I believe, some phrases in here that may sound to be duplicate. So disregard them, as I do not mean to over-emphasize them.

You are the sole judges of the credibility of the witnesses. It is your duty to determine where lies the preponderance, that is, the greater weight of evidence in this case. The preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of evidence is, you may take into consideration the number of witnesses testifying to a particular fact or state of facts; and you may also take into consideration, so far as shown by the evidence, the opportunities of the several witnesses for seeing, knowing and understanding the things

590 about which they testify, their apparent intelligence or lack thereof; their appearance, conduct and demeanor while testifying, their interest or lack of interest, if any, as shown by the evidence, in the result of the suit; the probability or improbability of the truth of their several statements, in view of all the evidence, facts and circumstances proved on the trial; and from all these facts and circumstances, and from a full consideration of all the evidence, determine upon which side is the greater weight or preponderance of the evidence.

The court instructs the jury that when the jurisdiction over the property covered by the lease was transferred to the Army by the Navy on May 5, 1954, the Army acquired no greater rights in the property than the Navy had previous to the transfer, and the Army was bound by the same terms of the lease as was the Navy, insofar as the Illinois Corporation was concerned.

You should not be swayed by emotion, prejudice, sympathy or any appeals to your feelings. You should not be swayed in any way by the question of the source of the money necessary to pay for the property taken.

591 Your verdict must be based upon the evidence admitted in this case.

The jury is further instructed that they may not speculate or infer from the fact that the Illinois Corporation is no longer in possession of the premises, that the lease involved was or had been cancelled.

Furthermore, the fact that the Army is now using the property for defense purposes shall not effect your determination of the fair market value of this leasehold as of October 6, 1954.

The jury are instructed that the fact that Illinois Corporation had no trailer park license from the State of Illinois or Cook County is of no importance because such licenses could not be obtained for a trailer park on federal land, and the lack of such licenses did not affect the fair market value of the company's lease.

The jury are instructed that if the preamble, or preliminary recitals of a lease are clear and the body of the lease is not clear, the preamble must be taken into consideration in order to arrive at a correct interpretation of the lease.

592 You are instructed that where the body of the lease in evidence is not ambiguous, that is, where the

meaning thereof is not uncertain, the body of the lease controls and there is no need to refer to the "whereas" clauses or "preamble" in construing said lease.

You are further instructed that the lease speaks for itself and the intention of the parties is to be determined from the writing itself and in determining such intention of the parties in this lease you must look to the provisions given and take on behalf of each party thereto.

You are instructed that the lease in evidence between the parties is a valid agreement; that it provides that the Government has the right to revoke the lease upon giving lessee 60 days' written notice of cancellation under the conditions set forth in paragraph 14 thereof, namely in the event of a national emergency and a decision by the Secretary of the Navy that such revocation is essential for aviation purposes.

Fair cash market value means the sum of money for which the leasehold of the property could be sold, if offered for sale, in an open market by an owner, 593 who is ready, willing and able to sell, to a person, who is ready, willing and able to buy, for cash or terms equivalent to cash, within a reasonable time, neither of whom is under any compulsion to sell or to buy and, of course, with full information as to what the leasehold is.

The court instructs the jury that this lease has not been cancelled.

The jury is further instructed to disregard any and all statements by counsel or witnesses suggesting anything to the contrary. In other words, we are proceeding by taking the property and then valuing it, rather than the other procedure.

The court instructs the jury that the present use by the Army of the property in question is not an aviation use of the property within the meaning of the lease.

The jury are instructed that a lease must be construed most strongly against the party who prepared it.

In determining just compensation the jury shall decide what the fair market value of the condemned leasehold was on October 6, 1954. This means what amount

594 —this is a little repetitious, but I have it here and I will give it to you— This means what amount a willing buyer would pay a willing seller on October 6, 1954, for the two years and eight months period expiring on May 1, 1957, of Illinois Corporation's lease covering the property, which includes the airport, the trailer park and barracks. You must assume that such a willing buyer would not know of this condemnation suit or any threat thereof. However, he would know of the contents of the lease.

Now, ladies and gentlemen of the jury, you will have one form of a verdict. Usually you have two forms. But in this case you will have one form. You are called upon to do one thing, and I am not telling you what to find is the just compensation, but I am saying that the only form of a verdict you will have is this:

> "We, the jury, find that the just compensation which should be paid for the taking of the leasehold herein is,"

and then it is blank, and it is to be signed by the foreman and each of you.

You have heard all of the evidence, and the amount

595 you find —I will not suggest the lowest possible nor the highest possible figure, because I have not intended to try to influence you in any way by any opinion of mine as to what the compensation should be.

I am going to excuse you for a moment before the Marshal is sworn. You will please go into the jury room very briefly, and then you will come back in about one minute.

(Whereupon the following proceedings were had in open court, out of the presence and hearing of the jury:)

The Court: I have begun following the practice pretty literally of following the rules of the court, and after the instructions are given I give each side an opportunity to renew its objections and to make any additional objections to the instructions or remarks of the court, or anything else. So at this time either side may, for the record, in addition to what has been made before, make additional remarks to protect your record.

Mr. Swanstrom: I think, if the court please, on behalf of the Government we have made sufficient objec-
596 tions to these instructions, in that they are almost peremptory in demanding a return of a monetary consideration, and also I think the instructions are wrong in the features where they indicate the operation of the property and no cancellation.

I want at this time to make a motion also that the court give the jury another form of verdict, one that will call for a compensation of no dollars and no cents, that this is not precluded in any condemnation case.

The Court: The motion is considered and refused, for the reason that the form that I have given them makes it possible for them to put in no dollars and no cents, or one dollars, or whatever they wish, because the law requires a finding of a just compensation, and if the jury finds that, well, we will cross that bridge when we come to it. But it is my judgment that this is the better form, and the motion is refused.

Mr. Swanstrom: I do not want to unduly enlarge on this, but the court will recall that the court told the jury that if it brought in a verdict of no dollars and no cents the court would have to set aside that kind of a verdict and grant a new trial.

597 Mr. Ashenden: I have nothing further to add to—

The Court: You have nothing further to add?

I believe under the evidence the court would be required to do it because, as it is now, the evidence is very clear that there was at least sixty days of possession. But that is neither here nor there.

Call the jury.

(Whereupon the following proceedings were had in open court, in the presence and hearing of the jury:)

The Court: Mr. Clerk, will you swear the Marshal to take charge of the jury?

(The Deputy Marshal was duly sworn.)

The Court: Mr. Marshal, here is the form of verdict, and you will also take the exhibits that counsel will give to you.

The jury is now excused to the jury room for deliberation, and I will see counsel in just a second.

(Whereupon the jury retired to deliberate, and the following further proceedings were had in open court, out of the presence and hearing of the jury:)

598 The Court: Gentlemen, my procedure is to never tell the jury just when we are going to be through, but I would say that if the jury does not reach a verdict by ten o'clock tonight, I will then get in touch with them and discharge them as a hung jury.

Mr. Swanstrom: Ten o'clock is pretty late, isn't it? That is seven hours.

The Court: I know. That is long enough in my judgment.

Mr. Swanstrom: Isn't that rather lengthy?

The Court: I don't know, we have spent a lot of time

trying this case, and I think we ought to try and get a verdict if at all possible. But a verdict after that length of time would become one of compulsion, I would think. So I will release them at ten o'clock.

Is each of you willing to waive the polling of the jury or do you want—

Mr. Hartenfeld: Your Honor, we would like to not waive it.

The Court: All right. Then we will not waive the polling of the jury and they will be instructed to return here tomorrow morning at ten o'clock. Do you want the verdict opened or left sealed?

599 Mr. Hartenfeld: Judge, we would like to reserve the right to poll.

The Court: All right. Are you agreeable that they may separate—

Mr. Hartenfeld: Yes, sir.

The Court: And that the jury—

Mr. Hartenfeld: They can announce their verdict—

The Court: They may separate, and you do not waive the polling of the jury.

All right, the jury will reassemble at ten a.m. April 16. Very good.

Mr. Swanstrom: That will be the proper time to make a motion, to let you know what I have in mind.

Mr. Ashenden: A couple of exhibits, your Honor, have not been marked received.

The Court: You gentlemen do that and let me call this other case.

The Marshal will take them in.

Mr. Hartenfeld: Your Honor, under this procedure if they reach a verdict we can know what the result is tonight, is that right?

The Court: Mr. Marshal, with a stipulation, as I understand it, you will be authorized to look at the ver-

dict and tell each of the lawyers as to the results
600 thereof, then you will reseal the verdict, and it will be read in open court tomorrow morning.

Mr. Hartenfeld: Your Honor, we may waive the polling of the jury. Some of my associates feel that way.

The Court: All right. We will now waive the polling of the jury. Change that to show the waiving of the polling of the jury, and we will provide that they do not reassemble tomorrow.

You gentlemen understand that I will release the jury at ten o'clock tonight, and they will not be so advised at any time prior to their release. I will keep urging them to get a verdict.

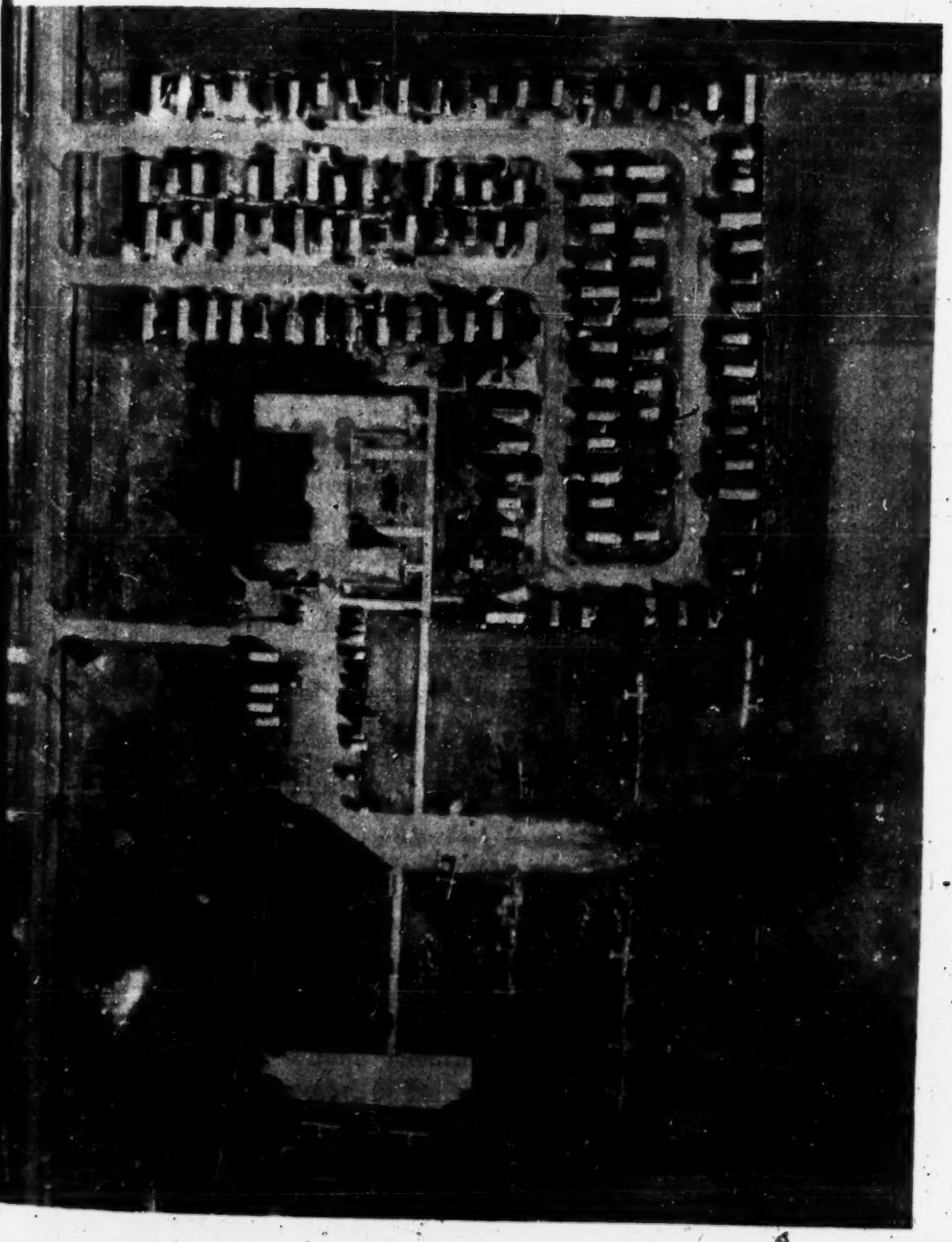
601

IN THE UNITED STATES DISTRICT COURT

* * (Caption—Civil Action No. 54 C 1468) * *

I, Edward Newlander, do hereby certify that the foregoing, consisting of pages 1 through 600, is a full, true and accurate transcript of the proceedings had in the trial of the above entitled case before Hon. J. Sam Perry, one of the judges of said court, and a jury, on April 8, 9, 10, 11, 12 and 13, 1957 (except that the arguments to the jury in summation were not transcribed).

/s/ Edward Newlander
Official Court Reporter
United States District Court
Northern District of Illinois



Plaintiff's Exhibit 4

PLAINTIFF'S EXHIBIT 5
(Filed Nov 18 1957)

State of Illinois }
County of Sangamon } ss.

I, Roland R. Cross, Director of the Department of Public Health of the State of Illinois, and official custodian of the records of said Department, do hereby certify that the Illinois Aircraft Service and Sales Company, Inc., operator of the Arlington Trailer Park, located south of Central Road in Elk Grove Township, at the Arlington Heights Airport, near Arlington Heights, Cook County, Illinois, has not made application for a license, nor has a license been issued by the Department of Health of the State of Illinois for the operation of said trailer coach park, as provided in Section 2 of "An Act in relation to the licensing and regulation of trailer coach parks." (par. 166, chapter 111½ of the Illinois revised statutes)

In Witness Whereof, I have hereunto set my hand and caused the seal of the Department of Public Health to be affixed. Done at the City of Springfield, this 4th day of January, Nineteen Hundred and Fifty Seven.

/s/ Roland R. Cross, M.D.
Director, Department of Public Health, State of Illinois

(Seal)

I, DeWitt S. Crow, one of the judges of the 7th Judicial Circuit of the State of Illinois, do hereby certify that Roland R. Cross is the duly appointed Director of the Department of Public Health of the State of Illinois, and, as such Director, is the custodian of all the records of the Department of Public Health of the State of Illinois.

Given under my hand this 7th day of January, Nineteen Hundred and Fifty Seven.

/s/ DeWitt S. Crow
DeWitt S. Crow
Judge of the 7th Judicial Circuit
State of Illinois

PLAINTIFF'S EXHIBIT 6
(Filed Nov 16 1957)

(Letterhead of Cook County Department of Public Health)

May 11, 1948

Trailer Camps—Arlington Trailer Court
3 miles west of U.S. #14
On Central Road

Mr. Homer D. Coffman, Manager
Arlington Trailer Court
Arlington Heights, Illinois

Dear Mr. Coffman:

Engineer Robert de Jonge inspected the sanitary facilities at your camp on April 8, 1948, to determine compliance with the "Regulations for the Sanitary Control of Tourist and Trailer Camps," issued by the Illinois Department of Public Health, July 1, 1942, a copy of which is enclosed.

The results of this inspection show that your camp did not comply with these regulations because of the following sanitary defects:

1. Sewage from the trailers and barracks is not disposed of properly. The treatment plant is too small and was, at the time of the inspection, practically inoperative due to poor maintenance.

2. There are not enough toilets, showers, and lavatories for the number of people using them.

3. The garbage house is too far from most of the trailer sales and is adequate in size only for the barracks.

4. The water supply is obtained from the Niagaran limestone formation which is cracked, creviced and filled with solution channels. These channels can convey water and likewise pollution for great distances without any filtering or purifying action.

In order to correct the sanitary defects at your camp, we recommend the following items be complied with:

1. Determine the ultimate size of the trailer camp and increase the size of the sewage treatment plant to adequately serve the camp, barracks and hangar. According to plans in this office, your present disposal plant is sufficient to serve 66 trailer or apartment families and does not take into consideration either the hangar or the lunchroom.

2. Provide an adequate number of toilets, showers, and lavatories in a separate building for the exclusive use of the trailerites. There should be one toilet, shower, and lavatory for every ten trailer spaces or fraction thereof, for each sex.

3. Provide approved garbage collection depots not further than 250 feet from any trailer space.

4. Provide adequate maintenance and operation of the sewage treatment plant.

5. Repair the existing chlorinator and provide adequate and continuous chlorination of all water pumped.

The appended analysis shows the water to be free from pollutional organisms at the time the sample was collected. Our records show that similar limestone wells are subject to intermittent contamination and cannot be considered safe unless the water is continuously chlorinated.

We suggest that before the camp is expanded beyond its present size (60 trailers) that you or your repre-

sentative visit our office to confer with our Sanitary Engineers regarding the above recommendations.

We would appreciate an acknowledgment of this letter together with a statement regarding your future plans in regard to the trailer camp.

Very truly yours,

/s/ Benn J. Leland, Chief Sanitary Engineer

RDJ:hl
Encl
cc — C.C. Zoning Bureau
— C.C. Board of Health
— Ill. Dept. of Health

PLAINTIFF'S EXHIBIT 7

October 9, 1952

Arlington Airport Trailer Camp #3
Central Road
Arlington Heights, Illinois
Attention: Mr. Rogers, Manager

Dear Sir:

Following receipt of a complaint our Engineer A. F. Vondrick made an investigation of an alleged stream pollution condition cause by the mis-management and mis-operation of the sewage treatment facilities serving the Arlington Airport, barracks and trailer camp.

This inspection was made on October 1, 1952, and revealed that the complaints were justified.

Apparently, an attempt to withdraw sludge from the septic tank resulted in the discharge of sewage to the roadside ditch and creek. This condition is a violation of the Sanitary Water Board Law and as you know creates a sanitary nuisance and is a threat to the health of all persons residing or working in the vicinity.

We trust you will take the necessary precautions to prevent a recurrence of this nuisance condition. In this

respect, we recommend that you engage the services of a professional scavenger whenever it is necessary to withdraw sludge from the septic tank, and not attempt to dispose of this material by utilizing soakage pits.

This type of operation is not recommended and our experience indicates that success with it is difficult even with rigid supervision, unless sludge drying beds of standard engineering design are utilized.

Our files indicate that the disposal system was designed to accommodate the sewage from approximately 45 trailers or equivalent. This fact considered with inspection observations make it apparent that the system is overloaded to some extent.

In order to abate the pollution of the receiving creek, it will be necessary to provide additional treatment capacity of adequate capacity to accomodate all the trailer camps, barracks, and airport facilities.

The critical need for additional treatment capacity requires adequate maintenance and operation of the existing facilities, more so than under normal circumstances.

May we have your reply stating what steps you intend to take to abate this pollution. We will be glad to confer with you to achieve this objective.

By Direction of the Director.

Very truly yours,
/s/ Benn J. Leland
Benn J. Leland,
Chief Sanitary Engineer

AFV:mz
cc — Ill. Dept. of Health
— C.C. Board of Health
— District Office
—Mr. Robert Winter, (Not on Original)
Box 43X
Arlington Heights, Ill.

DEFENDANTS EX. 1
(Filed Nov 25 1957)

Certified Conformed Copy
ND9:441:DE-200:DE-210g:pkh
Ser 2659
14 Apr 1953

First Endorsement on ComNABine ltr ND9-441 :DE-210g:pkh Ser 2658 of even date to BuDocks via channels
From: Commandant, Ninth Naval District
To: Chief, Bureau of Yards and Docks
Via: (1) Chief, Naval Air Reserve Training
(2) Chief, Naval Air Training
(3) Chief, Bureau of Aeronautics
Subj: OLF (Inactive) Arlington Heights, Illinois of NAS, Glenview, Illinois; recommendation for disposition of
Encl: (2) CO, NAS, Glenview, Illinois ltr Ser 2951 of 23 Aug 1952 to ComNine, in quadruplicate

1. The Commanding Officer of the Naval Air Station, Glenview, Illinois has indicated, in enclosure (2), that there is no immediate nor any foreseeable future need for the property except to accommodate a possible and very occasional forced landing in an emergency. It is considered, however, that the possibility of such emergency use is not sufficient to justify retention of the field. There is no other District need for the property.

2. A representative of the Commanding General, Fifth Army Headquarters inspected the property during the summer of 1952, as a result of which the Commanding General informally advised the Commandant that the Army had no substantial interest in its possible acquisition.

3. After careful review of the material and information submitted herewith, the Commandant concurs with the recommendation expressed in the basic letter that the

property be declared excess to Navy needs and disposed of.

4. It is assumed that intermediate addressees will comment, as a policy matter, as to whether or not the field would be of value to the Navy air command under mobilization conditions. Its use is not otherwise included in the District mobilization plans.

Francis P. Old

Restricted

Copy to:
CNO
ComNABNine
CO, NAS, Glenview, Illinois
W. P. Hummeland.
Certified to be a true copy

DEFENDANTS EX. 2B
(Filed Nov 25 1957)

Certified Conformed Copy

Aer-SE-11
NA/18 87548
26 Jun 1953

Restricted
Security Information
Fifth Endorsement on Comnabnine ltr ND9:441:DE-210g:pkh Ser 2658 of 14 Apr 1953 to Budocks w/ends & encl
From: Chief, Bureau of Aeronautics
To: Chief, Bureau of Yards and Docks
Via: Chief of Naval Operations (Op-5020)
Subj: OLF (Inactive) Arlington Heights, Illinois of NAS, Glenview, Illinois; recommendation for disposition of

1. The Bureau of Aeronautics knows of no current or mobilization plans which will require the use of this property for aeronautical purposes. Consequently, it is rec-

ommended that OLF Arlington Heights be declared as excess to the needs of naval aviation and, unless needed by some other naval activity, disposed of as surplus property.

2. Inasmuch as it is indicated that the area surrounding the field is being built up rapidly and hence holds no promise for future naval aviation usage, it is recommended that the field be disposed of without any conditions as to recapture or use.

J. C. Alderman
By direction

Copy to:
COMNINE
CNATRA
CNATECHTRA
CNARESTRA
COMNABNINE

Unclassified when enclosure (1) is removed.
Restricted
Security Information
W. P. Hummeland
Certified to be a true copy

DEFENDANTS EX. 2C
(Filed Nov 25 1957)

Certified Conformed Copy

Restricted
Security Information
Sixth Endorsement on Comnabnine ltr ND9:DE-210g:pkh ser 2658 of 14 Apr 1953
From: Chief of Naval Operations
To: Chief, Bureau of Yards and Docks
Subj: OLF (Inactive) Arlington Heights, Illinois of NAS,

Glenview, Illinois; recommendation for disposition of

1. Forwarded.

2. The Chief of Naval Operations approves as to military features the disposition of OLF (Inactive) Arlington Heights, Illinois of Naval Air Station, Glenview, Illinois.

3. The Chief, Bureau of Yards and Docks is requested to take the necessary continuing action.

W. S. Veeder
By direction

Copy to:
COMNINE
COMNABNINE
CNATRA
CNATECHTRA
CNARESTRA
CO NAS, Glenview
OP-50
Restricted
Security Information
BUAER
W. P. Hummeland
Certified to be a true copy

DEFENDANTS EX. 3
(Filed Nov 25 1957)

Certified Conformed Copy
DEPARTMENT OF THE NAVY
Bureau of Yards and Docks
Washington 25, D. C.

In reply refer to
C-422/ADG:bk
ND9/N1-1
P14-66-GL-7
T14-66-GL
5 May 1954

From: Chief, Bureau of Yards and Docks
To: Department of the Army, Office of the Chief of Engineers, Washington 25, D.C.
Subj: Outlying Field No. 25610, Arlington Heights, U. S. Naval Air Station, Glenview, Illinois; transfer of to the Department of the Army
Ref: (a) Dept. of Army, Ofc. of the Under Secretary ltr of 14 Aur 1954 to ASTSECNAV
Encl: (1) Map captioned "Auxiliary Airport Field No. 25610", dated June 30, 1945

1. The Assistant Secretary of the Navy has approved the transfer of the subject property to the Department of the Army. In accordance with the request contained in reference (a) and pursuant to existing authority, the Department of the Navy hereby transfers to the Department of the Army, effective as of 28 April 1954, jurisdiction, administration, custody and control of approximately 93.97 acres of land, designated as Outlying Field No. 25610, Arlington Heights, U. S. Naval Air Station, Glenview, Illinois, as delineated on Exhibit "A" attached herewith, together with all improvements and appurtenances thereon and thereunto belonging.

2. In accordance with reference (a), wherein request is made that Lease Agreement NOy(R)-41329 between the Illinois Aircraft Services and Sales Company, Inc. and the Department of the Navy be formally assigned to your Department, such assignment is hereby made, effective as of 28 April 1954.

3. The Department of the Army has advised this Department that the necessary Congressional approvals have been secured pursuant to Title VI of the Act of Congress of 28 September 1951 (65 Stat. 365, 40 USC 551); further, that the requirements of the Department of Defense Directive No. 4165.12 dated 8 March 1954 have also been satisfield.

4. Such muniments of title as are on file in this Department will be furnished upon request.

Jack E. Cochrane
By direction

W. P. Hummeland
Certified to be a true copy
Copy to:
ASTSECDEF (Properties and Installations)
BUAER
COM 9ND
DPWO 9ND
COMNAB 9ND
CNARESTRA
CNATRA
CO NAS Glenview
Chicago Corps of Engineers,
1660 East Hyde Park Blvd.,
Chicago 15, Illinois
NRAO Washington

DEFENDANTS EX. 4
(Filed Nov 25 1957)

Copy

MODIFICATION OF AGREEMENT NOy(R)-41329
between
ILLINOIS AIRCRAFT SERVICES AND SALES COMPANY, INCORPORATED
and
THE UNITED STATES OF AMERICA

This Modification of agreement entitled Agreement No. NOY(R)-41329 by and between the Illinois Aircraft Services and Sales Company, Incorporated, a corporation duly organized and doing business in accordance with the laws of the State of Illinois, hereinafter called the Lessee and

the United States of America, represented by the Chief of the Bureau of Yards and Docks, acting under the directon of the Secretary of the Navy, hereinafter called the Government:

WITNESSETH

Whereas, the Lessee and the Government, upon the date of May 2, 1947, entered into a certain agreement designated as Agreement No. NOy(R)-41329, under which the Lessee was granted a lease covering the U. S. Naval Outlying Airfield, Arlington Heights, Illinois; and

Whereas, under paragraph numbered 5 of the said Agreement No. NOy(R)-41329, the Government retained the right at its election to re-enter possession of the barracks building covered by paragraph numbered 5; and

Whereas, a determination has been reached by the parties hereto that it will be to their mutual benefit for the Lessee to assume full control, possession and responsibility for the barracks building and for the Government to relinquish its right to elect to re-enter the premises for its own purpose other than is generally provided for under the terms of the lease.

Now Therefore, in consideration of the premises and of the mutual covenants and agreements hereinafter set forth, it is contracted and agreed by and between the parties hereto as follows:

I

Paragraph entitled and numbered 5 of the Agreement No. NOy(R)-41329, in its present form is modified and amended to the extent that the Government relinquishes its right to re-enter the barracks building as is provided for in this paragraph only and the Lessee agrees to assume full custody and responsibility for the barracks

building, in the same manner as the remaining portion of the premises at the U. S. Naval Outlying Airfield were delivered to its custody and control.

II

It is understood by the parties that other than paragraph numbered 5, no other provision of the Agreement No. NOy(R)-41329 is altered, changed or in any wise affected.

In Witness Whereof, the parties have hereunto subscribed their names as of this 9th day of February, 1948.

The United States of America
By /s/ Jack E. Cochrane
By direction of the Chief of
the Bureau of Yards and Docks,
acting under the direction of
the Secretary of the Navy.
Illinois Aircraft Services and
Sales Company, Incorporated
By /s/ L. M. Mantynband
Vice Pres.

Attest:
By /s/ Irvin I. Zutz
Secretary

DEFENDANTS EX. 5
(Filed Nov 25 1957)

DEPARTMENT OF THE ARMY
NOTICE OF REVOCATION
United States Naval Outlying Air
Field, Arlington Heights, Illinois

To: Illinois Aircraft Services and Sales Company, Incorporated

Whereas the United States of America, as lessor, represented by the Chief of the Bureau of Yards and Docks,

acting under direction of the Secretary of the Navy, did enter into a lease agreement on May 2, 1947 with the Illinois Aircraft Services and Sales Company, Incorporated, as lessee, covering certain lands and improvements comprising the United States Naval Outlying Airfield, Arlington Heights, Illinois, which lease agreement was subsequently amended on February 9, 1948; and

Whereas said lease, as amended, expired on May 1, 1952, subject, however, to renewal for an additional five (5) year term upon compliance with certain conditions provided therein; and

Whereas the said lease did elect to renew said lease for an additional five (5) year term; and

Whereas under the laws of the United States, jurisdiction and control over the said United States Naval Outlying Airfield was transferred to the Department of the Army as of April 28, 1954, and the administration of all real property comprising said airfield, including the administration of said lease, was thereby transferred to the Department of the Army; and

Whereas the President of the United States, by Proclamation No. 2914, dated December 16, 1950, did declare a national emergency to exist, which national emergency is still in effect; and

Whereas possession of the leased premises by the United States of America is required for military purposes; and

Whereas paragraph 14 of said lease provides that the lease may be revoked in the event of a national emergency and a decision by the Secretary of the Navy that such revocation is essential; and

Whereas I, as Secretary of the Army, having succeeded the Secretary of the Navy in administering the said lease on behalf of the United States of America,

have decided that the revocation of the said lease is essential

Now, Therefore,

Take Notice That:

Under the authority conferred by the aforesaid transfer of jurisdiction and the laws of the United States, (the lease granted to you on May 2, 1947 of certain land and improvements comprising the United States Naval Outlying Airfield, Arlington Heights, Illinois, for a term of five (5) years beginning May 2, 1947 and ending May 1, 1952, which was subsequently amended and renewed for an additional term of five (5) years,) is hereby revoked, effective September 27, 1954. You are hereby notified to remove your property from said premises on or before said date and to restore the premises in accordance with the provisions of paragraphs 4 and 9 of said lease.

The revocation of this lease does not release you from the obligation of paying any rent due to the United States thereunder.

Dated this 21st day of June 1954.

/s/ Robert T. Stevens
Robert T. Stevens
Secretary of the Army.

This Notice of Revocation is also executed by the Secretary of the Navy as evidence of a decision by him that revocation of said lease is essential.

Dated this 17th day of July 1954.

/s/ C. S. Thomas

73

IN THE UNITED STATES DISTRICT COURT

• • (Caption—Civil Action No. 54 C 1468) • •

Tuesday, April 16, 1957

Present: Honorable J. Sam Perry, District Judge.

This cause coming on for the return of the Jury's sealed verdict again come the parties by their counsel and come also the Jury and render their verdict and on their oath do say:

"We, the Jury find that the just compensation which should be paid for the taking of the leasehold herein is Twenty Five Thousand ($25,000.00) Dollars and No Cents."

It is therefore Ordered And Adjudged that the defendant Illinois Aircraft Services and Sales Company, Incorporated recover of and from the plaintiff the sum of $25,000.00 as compensation for the taking of the leasehold herein.

74

UNITED STATES DISTRICT COURT
(Filed—Apr 16 1957)

• • (Caption—Civil Action No. 54 C 1468) • •

We, the Jury, find that the just compensation which should be paid for the taking of the leasehold herein is Twenty Five Thousand ($25,000.00) Dollars and No Cents.

/s/ John R. Quigley
Foreman
/s/ Robert F. Jaeger
/s/ Fred Rappenburg
/s/ Edith F. Seidler
/s/ Elsie H. Parker
/s/ Helen J. Levy
/s/ Mabel C. Kirwan

/s/ Lydia G. Douglas
/s/ Floyd W. Bennett
/s/ Edward C. Gustavson
/s/ Raymond Weidenaar
/s/ Charles E. Kenney

77

IN THE UNITED STATES DISTRICT COURT

(Caption—Civil Action No. 54 C 1468)

MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT
(Filed Apr 22 1957)

Now comes the plaintiff, United States of America, by R. Tieken, United States Attorney for the Northern District of Illinois, and moves, pursuant to Rule 50 (b) of the Federal Rules of Civil Procedure, that the judgment for the defendant, entered on April 16, 1957, be vacated and that judgment be entered for the plaintiff without compensation to the defendant notwithstanding the verdict of the jury returned on April 15, 1957.

In support of said motion the plaintiff urges the grounds set forth in plaintiff's motion for a directed verdict made at the close of all the evidence, which was at said time denied.

The plaintiff further urges that the manifest weight of the evidence in the above entitled cause is insufficient and does not support the verdict returned by the jury.

Respectfully submitted,
/s/ R. Tieken
R. Tieken,
United States Attorney.

LDS:PAC'M:ym

78A

IN THE UNITED STATES DISTRICT COURT

• • (Caption—Civil Action No. 54 C 1468) • •

Wednesday, April 24, 1957.

Present: Honorable J. Sam Perry, District Judge.

The Court being fully advised it is

Ordered that the motion of the plaintiff for judgment notwithstanding the verdict be and it hereby is denied.

81

IN THE UNITED STATES DISTRICT COURT

• • (Caption—Civil Action No. 54 C 1468) • •

DEFENDANT'S MOTION FOR ADDITUR, OR IN THE ALTERNATIVE, FOR A NEW TRIAL.

(Filed—Apr 24 1957)

Now comes the defendant, Illinois Aircraft Services and Sales Company, Incorporated, by its attorneys, James F. Ashenden, Jr., George Lennon, Leonard Hartenfeld and James Harrington, and moves the Court that:

1. The verdict returned by the jury in this cause on April 16, 1957, was in the amount of $25,000.00.

2. The only competent evidence introduced at the trial concerning just compensation, in accordance with the Court's instructions, was that of defendant's witnesses who testified that just compensation is at the very least $143,000.00, and could reasonably be in excess of $200,000.00. No competent evidence to the contrary appears in the record.

3. The jury's verdict and the judgment entered thereon are against the great weight of the evidence and deprive the defendant of the just compensation the defendant is

entitled to receive under the Fifth Amendment to the Constitution of the United States.

Wherefore, the defendant respectfully prays that
82 the Court substantially increase the jury's verdict by an additur and enter an amended judgment for the amount of such increased award consistent with the overwhelming evidence in this case, or in the alternative, grant the defendant a new trial.

Illinois Aircraft Services and Sales Company, Incorporated, Defendant
By /s/ James F. Ashenden Jr.
/s/ George Lennon
/s/ Leonard R. Hartenfeld
/s/ James Harrington
Its Attorneys

87

IN THE UNITED STATES DISTRICT COURT

* * (Caption—File No. 54 C 1468) * *

MOTION

(Filed—April 24 1957)

Now comes the defendant, Illinois Aircraft Services and Sales Company, Incorporated, by its attorneys, James F. Ashenden, Jr., George Lennon, Leonard Hartenfeld and James Harrington, and moves the Court that:

1. On April 16, 1957, judgment was entered on the verdict of the jury in this cause in the amount of $25,000.00. Said verdict and judgment did not include any interest on the award of just compensation.

2. The defendant is lawfully entitled to interest in addition to said award from the date the plaintiff took possession of the condemned property, namely, October 6, 1954, until said award is paid or the amount of such award is deposited with the Court by the plaintiff.

3. Said interest, computed at the rate of 6% per annum from October 16, 1954, through April 16, 1957, amounts to $3,791.10.

Wherefore, the defendant respectfully prays that the judgment heretofore entered herein be altered or amended to include said $3,791.10, and to further provide for
88 the continued running of interest at the rate of 6% per annum until said increased judgment is paid or the amount thereof be deposited with this Court.

Illinois Aircraft Services and Sales Company, Incorporated, Defendant
By /s/ James F. Ashenden Jr.
/s/ George Lennon
/s/ Leonard R. Hartenfeld
/s/ James Harrington
Its Attorneys

94

UNITED STATES DISTRICT COURT

(Caption—File No. 54 C 1468)

SUPPLEMENTAL
FINDINGS OF FACT AND CONCLUSIONS OF LAW
(filed July 9, 1957)

This cause having come on for trial before this court and the jury having duly rendered a verdict for the defendant-claimant, Illinois Aircraft Services and Sales Company, Incorporated, in the sum of Twenty-five Thousand Dollars ($25,000.00), and the said defendant-claimant having filed its alternative motion for additur or for a new trial and its motion for amended judgment to include interest, and this court having examined the pleadings and heard and considered all the evidence and being fully apprised of the facts and law relative thereto, finds as follows:

Findings of Fact

1. The government adduced no evidence whatsoever regarding the value of the premises in question on
95 the basis of the leasehold except on the theory that there was a cancellation of the lease which is contrary to the law and the facts.

2. The fair and just compensation for the premises in question is Seventy-five Thousand Dollars ($75,000.00).

3. The defendant-claimant, Illinois Aircraft Services and Sales Company, Incorporated, should be granted an additur of Fifty Thousand Dollars ($50,000.00).

Conclusions of Law

1. The defendant-claimant, Illinois Aircraft Services and Sales Company, Incorporated, is entitled to an additur of Fifty Thousand Dollars ($50,000.00), thereby giving it a total compensation of Seventy-five Thousand Dollars ($75,000.00) for the premises in question.

2. The defendant-claimant, Illinois Aircraft Services and Sales Company, Incorporated, is entitled to receive interest on the said amount of Seventy-five Thousand Dollars ($75,000.00) from October 4, 1954 to the date hereof at the rate of five per cent (5%) per annum.

Enter:

/s/ J. S. Perry
Judge

Dated: July 9, 1957.

96

UNITED STATES DISTRICT COURT

* * (Caption—File No. 54 C 1468) * *

AMENDED JUDGMENT

This cause having been duly tried before the court and a jury, and the jury having duly rendered a verdict for

claimant-defendant, Illinois Aircraft Services and Sales Company, Incorporated, and against the plaintiff in the sum of Twenty-five Thousand Dollars ($25,000.00), and this court having considered the motion of the said claimant-defendant for alteration of judgment to include interest and the alternative motion of said claimant-defendant for an additur or a new trial, and this court having found that the said claimant-defendant is entitled to interest at the rate of five per cent (5%) per annum from October 4, 1954 to the date hereof and that the said claimant-defendant is entitled to an additur of Fifty Thousand Dollars ($50,000.00), and this court having filed its
97 supplemental Findings of Fact and Conclusions of Law simultaneously herewith,

It is hereby Ordered, Adjudged and Decreed that the claimant-defendant, Illinois Aircraft Services and Sales Company, Incorporated, recover of the plaintiff the sum of Seventy-five Thousand Dollars ($75,000.00) together with interest of Ten Thousand Three Hundred Seventy-five and 2/100 Dollars ($10,375.02), making in all the sum of Eighty-five Thousand Three Hundred Seventy-five and 2/100 Dollars ($85,375.02), and that the claimant-defendant, Illinois Aircraft Services and Sales Company, Incorporated, have execution.

Enter:

/s/ J. S. Perry
Judge

Dated July 9, 1957

98

IN THE UNITED STATES DISTRICT COURT

• • (Caption—File No. 54 C 1468) • •

NOTICE OF APPEAL
(Filed—Sep 4 1957)

Notice Is Hereby Given that the plaintiff, United States of America, above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order amending the judgment heretofore entered herein, and entering the amended judgment against the United States of America, and in favor of the defendant, Illinois Aircraft Services and Sales Company, Incorporated, in the amount of $75,000.00, together with interest of $10,375.00 —making a total of $85,375.00 on July 9, 1957.

/s/ R. Tieken
R. Tieken,
United States Attorney.

Dated at Chicago, Illinois,
this 4th day of September, 1957.

99 United States Of America }
Northern District Of Illinois } ss.

CERTIFICATE OF MAILING

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on Sept. 4, 1957, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, a copy of the foregoing Notice of Appeal was mailed to:

Mr. George W. Lennen
231 S. LaSalle St.
Chicago, Illinois.

Mr. James A. Harrington
One N. LaSalle St.
Chicago, Illinois.

Mr. J. Herzyl Segal
One N. LaSalle St.
Chicago, Illinois.

Mr. James F. Ashenden, Jr.
Mr. Leonard R. Hartenfeld
O'Keefe, O'Brien & Hansen
33 S. Clark Street
Chicago, Illinois

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 4th day of September, 1957.

Roy H. Johnson
Clerk
By Sarah M. Brown
Deputy Clerk

(Seal)

100

IN THE UNITED STATES DISTRICT COURT
(Caption—Civil Action No. 54 C 1468)

NOTICE OF APPEAL
(Filed—Sep 5 1957)

Notice is hereby given that Illinois Aircraft Services and Sales Company, Incorporated, defendant in the above entitled cause, hereby appeals to the United States Court of Appeals for the Seventh Circuit from that part of the amended judgment entered in said cause on the 9th day of July, 1957, which awards an additur of $50,000.00, together with interest thereon, said appeal being on the ground that said additur, in view of the evidence, is inadequate and should have been for an amount not less than $117,000.00 and should have resulted in a total judgment of not less than $142,000.00, together with interest from the date of taking of the property being condemned.

Dated: September 5, 1957

/s/ George W. Lennon
George W. Lennon
231 S. LaSalle Street
Chicago 4, Illinois

/s/ James L. O'Keefe
James L. O'Keefe
33 South Clark Street
Chicago 3, Illinois

/s/ James F. Ashenden, Jr.
James F. Ashenden, Jr.
33 South Clark Street
Chicago 3, Illinois

/s/ Leonard R. Hartenfeld
Leonard R. Hartenfeld
33 South Clark Street
Chicago 3, Illinois

Attorneys for Defendant.

101 United States of America } ss:
Northern District of Illinois }

• • (Caption—File No. 54 C 1468) • •

CERTIFICATE OF MAILING

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on September 6, 1957, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, a copy of the foregoing Notice of Appeal was delivered at 9:00 A.M. to:

Mr. Robert Tieken
United States Attorney
U. S. Court House
Chicago 4, Illinois

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 6th day of September, 1957.

Roy H. Johnson, Clerk
By /s/ Sarah M. Brown
Deputy Clerk

(Seal)

102-104 • • •

United States of America } ss:
105 Northern District of Illinois }

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that the annexed and foregoing are the original papers constituting the record on appeal in the cause entitled: United States of America, Plaintiff vs. 93.970 Acres of Land, More or Less, Situate in Cook County, State of

Illinois, and Illinois Aircraft Services and Sales Company, Incorporated, Defendant, No. 54 C 1468, as follows:

Complaint, Condemnation, with Exhibits attached, filed October 6, 1954

Appearance of Illinois Aircraft Services and Sales Company, Incorporation, and attorneys, filed October 6, 1954

Plaintiff's Motion for order for delivery of possession, filed October 6, 1954

Order for delivery of possession entered October 6, 1954

Answer of Illinois Aircraft Services and Sales Company, Incorporated, Defendant, filed October 18, 1954

Notice and Motion of Illinois Aircraft Services and Sales Company, Incorporated, with affidavit of Walter Rogers, atached, filed November 4, 1954

Order entered November 5, 1954 granting plaintiff leave to file instanter its motion to strike defendant's answer and its brief in support thereof,

Plaintiff's Motion to strike answer of defendant, filed November 5, 1954

Order entered November 5, 1954, taking under advisement defendant's motion to vacate order entered October 6, 1954 and possession stayed until January 1,
106 1955

Order entered November 26, 1954 hearing held on defendant's motion to vacate order of October 6, 1954 and on plaintiff's motion to strike answer and said motions taken under advisement

Order entered January 4, 1955 denying Government's motion to strike answer of defendants

Order entered February 25, 1955, adding cause to list of cases awaiting trial on April 25, 1955

Order entered September 17, 1956 granting plaintiff leave to file motion for summary judgment

Plaintiff's Motion for summary judgment, filed September 17, 1956

Order entered September 17, 1956, setting cause for pre-trial conference on October 4, 1956, 1:45 p.m.

Order entered November 5, 1956, pre-trial conference is held and Government's motion for summary judgment denied and cause set for trial January 2, 1957

Order entered February 18, 1957 continuing trial to March 11, 1957

Order entered March 8, 1957 resetting trial to April 8, 1957

Appearing of Defendant Illinois Aircraft Services and Sales Company, Incorporated, filed April 3, 1957

Notice of Defendant, filed April 3, 1957

Motion of Defendant, Illinois Aircraft Services and Sales, Inc. filed April 3, 1957

Order entered April 3, 1957 granting leave to certain attorneys to file their appearance as attorneys for defendant, and motion of said defendants continued to April 8, 1957

Order entered April 8, 1957, cause called for trial, jury impaneled and sworn

Order entered April 9, 1957, further trial held

Order entered April 10, 1957, further trial held

Order entered April 11, 1957, further trial held

Notice for the production of original correspondence and documents, filed April 12, 1957

107 Order entered April 12, 1957, further trial held

Order entered April 15, 1957, further trial held, and plaintiff enters its motion for a directed verdict, which motion is denied, jury retire to consider their verdict

Order entered April 15, 1957, directing jury to return verdict, signed, and sealed

Order entered April 16, 1957, return of jury and verdict and judgment on the verdict

Verdict filed April 16, 1957

Notice and Motion of plaintiff for judgment notwithstanding the verdict filed April 22, 1957

Order entered April 22, 1957, plaintiff's motion entered and continued to April 24, 1957

Notice and motion of Defendant for additur, or in the alternative for a new trial filed April 24, 1957 with Brief in support of motion

Order entered April 24, 1957, taking under advisement defendant's motion to amend judgment

Motion of defendant and Brief in support of motion filed April 24, 1957

Order entered April 24, 1957 denying motion of plaintiff for judgment notwithstanding verdict

Supplemental Findings of Fact and Conclusions of Law, entered July 9, 1957

Amended Judgment entered July 9, 1957

Plaintiff's notice of Appeal filed September 4, 1957 Clerk's certificate of mailing attached thereto

Notice of Appeal of Defendant, Illinois Aircraft Services and Sales Company, Incorporated, filed September 5, 1957 Clerk's certificate of mailing attached thereto

Statement required by Rule 12(c) of the Rules of the United States Court of Appeals, for the Seventh Circuit, filed September 19, 1957

Order extending time for docketing record on appeal entered September 30, 1957

Order entered October 23, 1957 extending time for docketing record on appeal for a period of 90 days from September 4, 1957

108 filed and entered among the records of the said Court in my office, on the dates indicated.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 29th day of November, 1957.

Roy H. Johnson, Clerk
By /s/ Gizella Butcher,
Deputy Clerk

(Seal)

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 12,191

UNITED STATES OF AMERICA, Plaintiff-Appellant

v.

93.970 ACRES OF LAND IN COOK COUNTY, ILLINOIS, AND ILLINOIS AIRCRAFT SERVICES AND SALES COMPANY, INC., Defendant-Appellee

and

No. 12,192

UNITED STATES OF AMERICA, Plaintiff-Appellee

v.

93.970 ACRES OF LAND IN COOK COUNTY, ILLINOIS, AND ILLINOIS AIRCRAFT SERVICES AND SALES COMPANY, INC., Defendant-Appellant

STIPULATION AS TO CONTENTS OF JOINT APPENDIX

It is hereby stipulated and agreed by and between the parties to the above-entitled appeals, which are cross-appeals from the judgment in a single case below, that a single, joint appendix shall be filed and that said appendix shall contain the following items of the record:

Item		Date Filed
1.	List of all docket entries	
2.	Complaint including all exhibits except the map attached to the lease. Those exhibits are (A) Lease, (A-1) Modification of Agreement, and (A-2) Notice of Revocation	10-6-54
3.	Motion for order for delivery of possession	10-6-54
4.	Order for delivery of possession	10-6-54
5.	Answer of Illinois Aircraft Services and Sales Company, Inc.	10-18-54
6.	Motion to vacate order for possession and supporting affidavit	11-4-54
7.	Order staying possession until January 1, 1955	11-5-54
8.	Motion to strike defendant's answer	11-5-54
9.	Order denying motion to strike answer	1-4-55
10.	Government's motion for summary judgment	11-5-56
11.	Order denying Government's motion for summary judgment	11-5-56
12.	Entire reporter's transcript of the proceedings held on April 8, 9, 10, 11, 12 and 15, 1957. Pages 1-A through 1-Q, inclusive, and 1 through 601, inclusive	
13.	Plaintiff's exhibits 5, 6 and 7. (The omitted exhibits except photographs are designated herein as attachments to the complaint.) All of defendant's exhibits (1, 2B, 2C, 3, 4 and 5).	
14.	Verdict	4-16-57
15.	Judgment on verdict	4-16-57
16.	Government's motion for judgment notwithstanding verdict	4-22-57

17.	Order denying Government's motion notwithstanding verdict	4-24-57
18.	Defendant's motion to amend judgment to include interest	4-24-57
19.	Defendant's motion for additur or, alternatively, for a new trial	4-24-57
20.	Supplemental findings of fact and conclusions of law	7-9-57
21.	Amended judgment	7-9-57
22.	Government's notice of appeal	9-4-57
23.	Defendant's notice of appeal	9-5-57
24.	This stipulation as to the contents of printed, joint appendix	

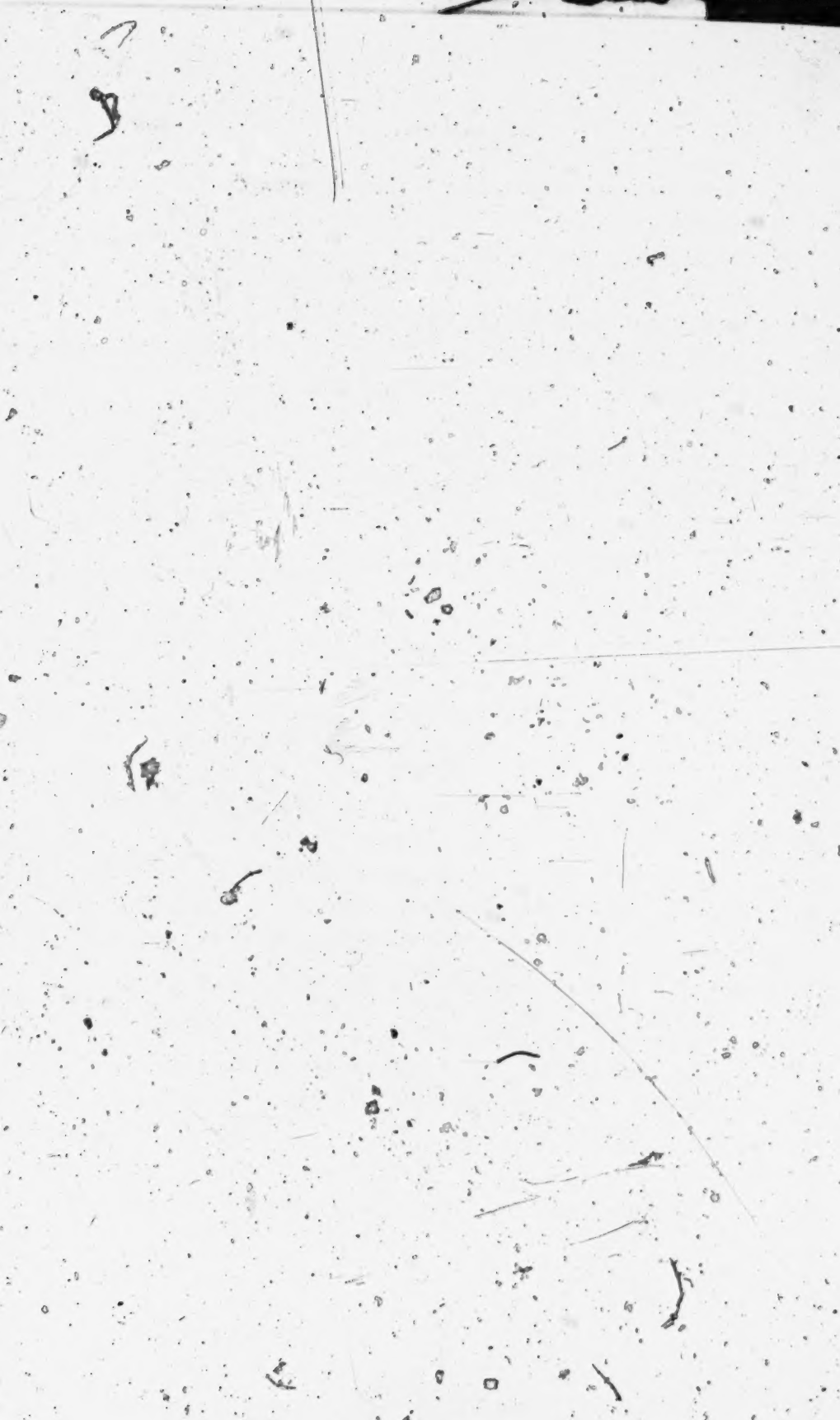
Counsel for the United States of America, appellant in No. 12,191, and appellee in No. 12,192.

Perry W. Morton
Assistant Attorney General

R. Tieken
United States Attorney,
Chicago, Illinois.

Roger P. Marquis
Attorney, Department of Justice
Washington, D. C.

Counsel for Illinois Aircraft Services and Sales Company, Inc., appellee in No. 12,191, and appellant in No. 12,192.



460 UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 12191–12192

OCTOBER TERM, 1957, APRIL SESSION 1958.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT, APPELLEE,

v.

93.970 ACRES OF LAND, MORE OR LESS, SITUATE IN COOK COUNTY, STATE OF ILLINOIS, AND ILLINOIS AIRCRAFT SERVICES AND SALES COMPANY, INCORPORATED, DEFENDANT-APPELLEE, APPELLANT

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

Before MAJOR, FINNEGAN and SCHNACKENBERG, Circuit Judges.

Opinion

July 15, 1958

MAJOR, *Circuit Judge*. This is a condemnation proceeding instituted by the United States to acquire all outstanding rights, if any, which defendant had in premises in Cook County, Ill., on which was located an airport, under lease from the government. The lease under which defendant occupied the premises was executed May 2, 1947, with certain modifications made February 9, 1948. The lease granted to lessee (defendant) the option of renewing the lease for a period of 5 years. This the lessee did. Thus, the lease as renewed extended to May 2, 1957. The lease contained a provision which authorized its revocation by the lessor under certain conditions subsequently discussed. The govern-
461 ment sought to exercise this power of revocation, effective September 27, 1954. Copies of the lease, the amendment thereto, and the government's notice of revocation are attached to and made a part of the complaint.

Defendant refused to honor the notice of revocation and vacate the property. On August 10, 1954, it sought in the District Court a declaratory judgment that the revocation was ineffective because the government proposed to use the property for purposes other than those described in the lease

as a basis for its right to revoke. The defendants in that action refused to waive immunity and moved to dismiss the complaint for lack of jurisdiction. Thereupon, plaintiff in that action withdrew its complaint. The Government instituted the instant action October 6, 1954, and was awarded immediate possession of the premises, with certain reservations not here material. The government by its condemnation action sought to acquire "all remaining outstanding right, title and interest, if any" of defendant in the property and to ascertain "just compensation, if any."

Defendant in its answer to the complaint sought just compensation for the remaining term of the lease, that is for a period of about 2½ years, or until May 1, 1957. It admitted receiving the notice of revocation but alleged that it was ineffective because it was not made in conformity with the terms of the lease. Defendant's answer also alleged that in filing a condemnation action, instead of ejectment or a similar action, the government elected "a remedy which is inconsistent with the theory that defendant has no possessory right and therefore implicitly recognizes the existence of a leasehold interest and is precluded as a matter of law from asserting that the lease has been terminated."

The government moved to strike defendant's answer, and for findings and judgment that defendant was not entitled to possession after September 27, 1954, and was, therefore, entitled to no compensation. The basis for the motion was that the answer set up no valid defense because defendant's tenancy expired by reason of the revocation, notice of which defendant admittedly received, which effectively terminated its interest on September 27, 1954, and for the further reason that
462 the necessity for taking by the government was not a matter for judicial inquiry. Upon denial of this motion, the government moved for summary judgment of no compensation on the basis that there was no issue of fact concerning the lease and its revocation and that as a matter of law the lease was validly revoked prior to commencement of the action. This motion was also denied.

The case was tried before a jury on the issue of compensation. At the inception of the trial the court ruled that the Government could not introduce in evidence or make any reference to the revocation notice, for the reason that it had selected the remedy of condemnation which necessarily acknowledged an

outstanding leasehold interest in defendant for the full part of the term remaining, October 6, 1954, to May 1, 1957. Much testimony was offered by each of the parties as to the value of the remaining leasehold interest. It is unnecessary at this point to relate this testimony. It is sufficient to note that the witnesses for the Government, based on its interpretation of the lease, testified that the interest sought to be taken had no value and as a result the Government was entitled to a finding of no compensation. On the other hand, defendant's witnesses, based on its interpretation of the lease, placed various estimates upon the value of defendant's remaining interest in the lease.

At the conclusion of the evidence, the Government's motion for a directed verdict of no compensation was denied. Consistent with this ruling and also with that made at the inception of the trial, the court denied the Government's request for the submission to the jury of a form of verdict which would have permitted a possible finding of no compensation. The jury returned a verdict in the amount of $25,000, and on April 16, 1957, judgment was entered in said amount in favor of defendant. After a consideration and disposal of various motions the court, on July 9, 1957, filed findings of fact and conclusions of law wherein it found and concluded that defendant was entitled to an additur of $50,000 (making a total base award of $75,000), with interest at 5% from October 6, 1954, the date of taking. On the same date the court entered what it labeled an "amended judgment," in which it was recited that defendant was entitled to an award of $85,375.02.

463 It is evident that this judgment included $50,000, the amount allowed as additur; $25,000, the amount awarded by the jury, and $10,375.02, interest on the sum of $75,000 from the date of taking.

The Government has appealed from the so-called amended judgment of July 9, 1957. No mention is made in its notice of appeal of the judgment entered April 16, 1957 (the first judgment). Defendant cross-appealed from the so-called amended judgment of July 9, 1957 (the second judgment) in its favor, on the ground that the court erred in failing to increase the award to the lowest level of value established by uncontradicted testimony. This so-called uncontradicted testimony refers to that offered by defendant upon its theory of the case, which was that embraced by the trial court.

We are met at the inception with the important and troublesome contention advanced by defendant that the Government, having appealed only from the so-called amended judgment of July 9, 1957, is precluded from here raising any issue other than that relative to the allowance of an additur. More specifically, it is contended that the Government by its failure to appeal from the judgment of April 16, 1957, is without right to a review of the issues both of law and fact which were raised and decided in the trial which resulted in that judgment. The importance of this contention is at once apparent because, if sustained, it is decisive of all issues other than that which relates to the court's allowance of the additur. We have, therefore, up to this point stated only such of the proceedings as we deem essential to bring into focus the instant question.

It is hardly open to doubt but that the first judgment standing alone was final and, therefore, appealable. It is equally certain that the Court, either on its own volition or at the instigation of the parties, possessed the authority within an appropriate time to vacate, modify or amend that judgment. We also think that in determining the question of the finality of the first judgment it should not be confined in a vacuum, separate and apart from the proceedings which followed.

On April 22, 1957, the Government filed its motion to vacate the April 16 judgment and prayed that a judgment of no compensation be entered for plaintiff, notwithstanding the jury verdict. On April 24, 1957 (8 days after the entry of the judgment), defendant filed its motion calling attention to the fact that the judgment did not include interest, and prayed "that the judgment heretofore entered herein be altered or amended" to include interest. On the same date, defendant filed its motion for additur or, in the alternative, for a new trial. In this motion defendant prayed "that the court substantially increase the jury's verdict by an additur and enter an amended judgment for the amount of such increased award" or, in the alternative, grant defendant a new trial.

464

Thus, in two respects defendant sought to amend the judgment: first, by the addition of interest and, second, by the allowance of an additur. That the defendant succeeded in both respects is evidenced by the fact that the second judgment included interest and the allowance of an additur. The second judgment also specifically included $25,000, the amount of the

jury award, which had been incorporated in the first judgment. It is not discernible how it can be logically held that there are now two final judgments (defendant's contention requires such a holding). It is certain that defendant would not be entitled to a satisfaction of both judgments. Satisfaction of the second would *ipso facto* satisfy the first. Conversely, satisfaction of the first would entitle the Government to a *pro tanto* credit on the second. In our view, the first judgment was merged in and became a part of the second. By such merger the first judgment was obliterated as effectively as if it had been expressly vacated by the court. It is evident that the parties as well as the court intended such result. Moreover, the result was accomplished at the behest of defendant which, as shown, was urging the court to enter an "amended judgment," not another judgment separate and distinct from the first.

Defendant in its brief asserts that its contention on this issue is "completely supported" by the following cases: *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206; *Durkin* v. *Mason & Dixon Lines, Inc.*, 202 F. 2d 425, and *Delta Drilling Co. et al.* v. *Arnett*, 186 F. 2d 481. In our view, these cases furnish feeble, if any, support for defendant's contention. It is pertinent to note that none involved a condemnation proceeding. In the *Honey-*
465 *well* case there was involved a cease and desist order issued by the Federal Trade Commission, and the question before the court was whether the petition for certiorari had been filed in the time designated by statute. A solution of this question required a determination as to when the statutory period commenced to run, that is, from an order of July 5, 1951 or from an order of September 18, 1951 (orders of this Court on petition for review). True, the court held that the first order was final, but upon the basis that it had not been substantially altered by the second order. As the Supreme Court stated concerning the second order (page 212), "It reiterated, without change, everything which had been decided on July 5." Relative to the issue of finality, the court in its discussion stated (page 212):

> "'The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality."

The *Durkin* case involved an action for failure to pay overtime wages. Two periods of time were involved. As to the first, the trial court dismissed the claim, but allowed recovery as to the second for an amount which was to be determined in accordance with a pre-trial stipulation of the parties. The court of appeals held that the order was final because it "settled all the equities between the parties and finally determined their rights."

The *Arnett* case involved the title to or ownership of certain oil and gas rights, with a prayer for an accounting. Two judgments were entered in the case and the court of appeals held that the first judgment was final because it settled the case on the merits. Nothing was added to the second judgment other than the result which flowed from an accounting which had been provided for by the first judgment.

It appears settled by the cases that just compensation is a material issue in every condemnation suit and that there can be no finality of judgment until this issue is definitely disposed of. In *McCandless et al.* v. *United States*, 298 U.S. 342, 348, the court stated:

> "In an eminent-domain proceeding, the vital issue—and generally the only issue—is that of just compensation."

466 In *Catlin et al.* v. *United States*, 324 U.S. 229, the court had before it the issue of the finality of a judgment in a condemnation proceeding. In its discussion the Court made the following pertinent statement (page 233):

> "Hence, ordinarily in condemnation proceedings appellate review may be had only upon an order or judgment disposing of the whole case, and adjudicating all rights, including ownership and just compensation, as well as the right to take the property. This has been the repeated holding of decisions here."

The same rationale was followed in *United States* v. *Richardson*, 204 F. 2d 552, 555.

We are not able to discern how it can be held that the first judgment, in view of subsequent proceedings, disposed of the whole case or that defendant can consistently contend that it was an award of just compensation for the property right sought to be taken. This is so even though it be thought that such judgment standing alone possessed all the indicia of finality under the rationale of the Supreme Court in *Catlin*. Its

finality, if such it had, at the time of entry was emasculated by subsequent proceedings which culminated in the second judgment from which the appeal is taken. It is, therefore, our view and we so hold that the government by its appeal from the second judgment is entitled to a review of the issues which it here presents.

We now come to the contested issues relating to the proceedings in the district court. As stated in the Government's brief (with no objection on the part of defendant), they are as follows:

> "1. Whether, in this condemnation proceeding by the United States to reacquire possession and to clear title to property which it had leased to Illinois Aircraft Co. the district court erred in refusing to enter judgment of no compensation on the basis of prior revocation of the lease because it ruled (a) that the use of a condemnation action constituted election of a remedy which admitted an outstanding leasehold interest and (b) that the lease had not been validly revoked under its terms.
>
> "2. Whether, on the issue of the value of the remaining term of the leasehold which had to be tried
> 467 under the foregoing rulings, the court erred (a) in stating before the jury that it would set aside a verdict of no compensation, (b) in receiving evidence of gross and net income from the airport operation or the trailer and barracks housing operation, (c) in receiving piecemeal valuations for the separate operations on the property and (d) in receiving evidence of value based on a construction that the lease was not revocable except 'for naval aviation uses' and that it authorized use of the property for a trailer park and barracks housing not related to the airport function.
>
> "3. Whether the court erred in trebling the verdict of the jury by purported additur and in awarding interest on the enlarged award."

Defendant enumerates other contested issues, all of which relate to the additur which the court included in its second judgment of July 9, 1957. These issues are here by reason of defendant's cross-appeal. They need not be stated at this point as their relevancy will depend upon our disposition of the issues raised by the Government.

Prior to the commencement of the trial, the Court ruled that the government could not introduce in evidence or make any reference to the revocation notice (which the government had served on defendant), on the ground that the government had selected the remedy of condemnation, which necessarily acknowledged an outstanding leasehold interest in defendant for the unexpired portion of the lease, that is, from October 6, 1954 to May 1, 1957. In connection with this ruling, the Court stated:

> "The court presumes that the Government knew what it was doing, it had some advantage to gain by filing a proceeding under condemnation rather than following the other procedure, which raised a very highly technical point in controversy which the Government sought to avoid, and properly, in my judgment."

Also, at the beginning of the trial, the court stated in the presence of the jury:

> "If they [the jury] found no money at all, counsel, I would be compelled to grant a new trial, and we would be
> 468 wasting their time, and this should not be submitted to the jury except on the basis of finding a fair value, and no value would be just the kind of a verdict I would have to reverse."

Consistent with this ruling, the Court denied a request by the Government for a directed verdict and also a request that there be submitted to the jury a form of verdict to be used in the event the jury found that defendant was entitled to no compensation.

The parties devote much effort to the question as to whether the issue of election of remedies in a condemnation suit is to be determined by Federal or State law. In our view, we need not be concerned with this question because the reasoning employed by both the Federal and State courts of Illinois leads to the same result. A more disturbing matter is the dearth of cases in both jurisdictions which have considered the doctrine in condemnation proceedings.

We shall first refer to Federal cases other than those in condemnation, where the doctrine has been discussed and applied. In *Henderson Tire & Rubber Co.* v. *Gregory et al.*, 16 F. 2d 589, 593, the court cites many cases in support of the statement that

the doctrine is widely recognized both in Federal and State courts. From the cited cases the Court concluded:

> "(1) The essential elements of the doctrine are (a) the existence of the two remedies; (b) the inconsistency between the remedies; (c) the choice of one of the remedies."

The doctrine was applied in *Intertype Corp.* v. *Pulver*, 2 F. Supp. 4, 6 (affirmed 65 F. 2d 214). In that case it was held that replevin would not lie because plaintiff had previously sought unsuccessfully to foreclose a chattel mortgage on the same property. In *Van Winkle et al.* v. *Crowel et al.*, 146 U.S. 42, it was held that a seller was precluded from maintaining an action of detinue to recover property after attempting, although unsuccessfully, to enforce a lien thereon. In *United States* v. *Oregon Lumber Co. et al.*, 260 U.S. 290, it was held as to a voidable sale of lands on account of fraud that the plaintiff was entitled to either disaffirm and recover the lands or affirm and recover damages for the fraud, but that it
469 could not do both. After holding that the rule was applicable to the government, the court stated (page 295):

> "Any decisive action by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and one of the most unequivocal of such determinative acts is the bringing of a suit based upon one or the other of these inconsistent conclusions."

Of the numerous other instances where the doctrine under consideration has been recognized in the Federal courts, see *Bierce* v. *Hutchins*, 205 U.S. 340, 346; *Zimmerman* v. *Harding*, 227 U.S. 489, 33 S. Ct. Rep. 387, 389.

Now, turning to Illinois cases, we note those wherein the doctrine has been applied in condemnation proceedings. In *The Metropolitan City Railway Co.* v. *The Chicago West Division Railway Co.*, 87 Ill. 317, the court stated (page 322):

> "Petitioner, after invoking the aid of the law to condemn certain property of defendant, will not be permitted to stultify itself by insisting defendant has no interest in that which it seeks to condemn to its own use under the Eminent Domain Act."

In *The Sanitary District of Chicago* v. *Pittsburgh, Ft. Wayne and Chicago Ry. Co. et al.*, 216 Ill. 575, the court held that the

averments of the petition as to defendants' interest or title were binding on petitioner but not on the defendants. The court stated (page 579):

> "If a corporation entitled to exercise the right of eminent domain claims that it already has a right to take land, a petition for condemnation is not the proper proceeding to try that question. It was the duty of the petitioner to ascertain the title to the premises before commencing the proceeding and to name in the petition the owner of the premises, and if the title was less than a fee simple or subject to an easement it should have been stated in the petition."

In *The Department of Public Works and Buildings* v. *Otto F. Sohm*, 315 Ill. 478, the Court in a condemnation case, on facts similar in many respects to those of the instant case, held that the right of possession was not a proper
470 issue in condemnation but that it should be determined in ejectment. The Court among other things stated (page 483):

> "The proceeding is special, statutory and summary, its sole object is to ascertain the compensation to be paid, and the amount is the only issue."

The Court reiterated what it had previously held, that averments in the petition as to title are binding on petitioner and that petition for condemnation is not a proper proceeding to vindicate a right which petitioner otherwise has to take the land.

The Federal courts recognize, as do the Illinois courts, that the sole object of condemnation is to ascertain just compensation for that which is taken. Reiterating our previous quotation from *McCandless et al.* v. *United States*, 298 U.S. 342, 348:

> "In an eminent-domain proceeding, the vital issue—and generally the only issue—is that of just compensation."

In *Danforth* v. *United States*, 308 U.S. 271, 284, the Court stated:

> "Condemnation is a means by which the sovereign may find out what any piece of property will cost."

The Government argues that claims based on liens or contracts may be settled, and clouds on titles resolved, in condemnation proceedings. This is true no doubt where such claims or

rights are incidental to the taking of property, for which just compensation is to be awarded. The Government in support of this contention cites *Eagle Lake Improvement Co. et al.* v. *United States*, 160 F. 2d 182, and *National Refining Co.* v. *United States*, 160 F. 2d 951. Neither case is of any aid to the Government. In the *Eagle* case the question was as to the manner of dividing the compensation award between a fee owner and a lessee. However, the Court made the pertinent observation (page 184):

> "A condemnation proceeding is an action *in rem*. It is not the taking of rights of designated persons, but *the taking of the property itself*."

The *National Refining* case is even more remote. In that case the compensation award was paid by the Government
471 into the registry of the Court and the litigation was between rival claimants to the fund.

The Government asserts that condemning property of which it claims ownership is common practice. In support of the statement it cites *United States* v. *San Geronimo Development Co., Inc., et al.*, 154 F. 2d 78; *Wittmayer et ux.* v. *United States*, 118 F. 2d 808, and *United States* v. *10,245 Acres of Land*, 50 F. Supp. 470. The nebulous support which these cases furnish the Government's assertion is an indication of the weakness of its position. In none was it sought to invoke the doctrine of election of remedies. It is true that in the *San Geronimo* case the court reluctantly approved a petition for condemnation which contained a provision that it was without prejudice to the right of the Government to dispute the claim of any party for compensation. The court did this after characterizing the proceeding (p. 80) as an "unfamiliar hybrid, and the substantive question upon which the decision turns is a special and non-recurring one as to which there are no precedents to indicate the answer." There is nothing in *Wittmayer* of any pertinency. In the *10,245 Acres of Land* case, the Government in connection with the declaration of taking made a deposit of estimated value. It developed, however, that the person who laid claim to the homestead (the premises sought to be condemned) had not perfected his rights and had no interest therein. In the action reported it was held that the Government was entitled to a return of its deposit. The case has no bearing here.

The Government points out what undoubtedly is a fact, that it might have proceeded in ejectment in order to secure possession. From this premise it argues that the defendant has not been hurt by the instant proceeding because if the Government had obtained possession in an ejectment action, defendant would have been relegated to the filing of a claim in the court of claims, to which the Government could have pleaded that it had no interest because of the revocation of the lease. In our view, this argument is beside the issue. We are not concerned with what the rights of the parties might have been had the Government proceeded in some other form of action. We are now concerned only with the rights in the condemnation proceeding which the Government elected to pursue.

472 Defendant places much reliance upon a decision of this Court, *United States* v. *Chicago, B. & Q. R. Co.*, 90 F. 2d 161. In that case the Government contended that the defendant had failed to establish any interest in a certain portion of the condemned property. The court, after noting that the action was prosecuted in accordance with laws of Wisconsin, stated (page 171):

> "It is the law of that State that where proceedings are instituted to condemn property, and the petition recites, as it must, title and ownership or interest by the defendant, the condemnor is thereby bound by such expressed recognition of title, and cannot be heard to assert the contrary nor compel one recognized as owner to prove or defend his title."

The Wisconsin rule thus announced and followed by this court is no different, as previously shown, from that adhered to by the courts of Illinois.

In *United States* v. *11.48 Acres of Land*, 212 F. 2d 853, the court employed similar reasoning and reached the same result. In that case the Government condemned the fee simple title and attempted to defeat the payment of just compensation on the contention that the contemplated use would be a mere exercise of the Government's dominant servitude over navigable waters. In short, the Government contended that it should not be required to pay just compensation because it had an existing right to use that which it sought to condemn. The condemnee argued "that the Government has elected to take his riparian rights by eminent domain and that he is therefore entitled to

just compensation." The Court, in sustaining the latter contention, stated (page 855):

> "We think that the appellee's alternative contention is sound, and, hence, we do not reach the question of whether the use intended by the Government would be a mere exercise of its servitude over navigable waters. Appellee's property was always subject to that dominant servitude. Its exercise involved no taking of private property within the meaning of the fifth amendment, and necessitated no condemnation proceeding. The United States has elected to take the fee simple, absolute, and indefeasible title to the lands."

473 The Government concedes that it had remedies, other than that of condemnation, by which it might have obtained possession of the property in controversy. This it could have done without the payment of any compensation on its theory that defendant's interest in the leasehold property had been extinguished by the Government's revocation made in conformity with the terms of the lease. Instead, it elected to institute the instant action to condemn defendant's leasehold interest. It thus, as must be done in all condemnation cases, invoked the jurisdiction of the Court for the purpose of determining just compensation to be awarded for that which it sought to condemn. In reality, that was the sole issue to be tried in the district court.

In our view, the trial court properly ruled that the Government was without right to rely upon its purported revocation of the lease. Such a position was entirely inconsistent with its condemnation complaint. In the same breath, the Government proclaimed and denied defendant's ownership of the leasehold estate. Such an absurd position is not countenanced by law, as we understand it, and neither is it supported by logic, reason, or commonsense.

This brings us to the rulings of the court as well as the testimony of the respective parties relative to the just compensation to be awarded. This requires some consideration of the terms of the lease, because the extent of defendant's claim or interest in the leasehold estate is dependent upon such terms. This is forcibly illustrated by the testimony of the witnesses for the respective parties on the issue of just compensation. Witnesses for the Government, based upon its interpretation of the lease, testified that defendant's interest had no value, while defend-

ant's witnesses, predicated upon its interpretation, testified that defendant's interest had great value.

The lease, as already shown, was executed May 2, 1947, for a term of 5 years, and was between the Navy Department, on behalf of the United States of America, and defendant. Defendant, exercising an option contained in the lease, renewed it for an additional 5-year term. On April 28, 1954, at the request of the Department of the Army, jurisdiction of the premises was transferred by the Navy Department to the Depart-
474 ment of the Army and the lease was formally assigned to it. Defendant was notified of the transfer and tendered rental to the new agency designated.

There is no question but that the lease conferred upon the Government the power of revocation. The controversy concerns the manner, purpose and by whom such power might be exercised. The Government's theory, rejected by the trial court, is that it could revoke at any time and apparently for any purpose. On the other hand, defendant contends, and the trial court held, that the lease was revocable only upon "decision by the Secretary of the Navy that such revocation is essential for aviation purposes." It is not disputed on either theory but that the lease could be revoked only in the event of a national emergency, that such emergency had been declared by the President on December 16, 1950, and was in existence at the time of the execution of the lease and still is in existence.

The heart of the controversy resides in paragraph 14 of the lease, as follows:

> "It is understood and agreed that this lease will at all times be revocable at will by the Government upon presentation of notice of cancellation to the lessee, in writing, sixty (60) days prior to such termination, in the event of default with regard to the covenants and conditions of the lease or *in event of a national emergency and a decision by the Secretary of the Navy that such revocation is essential.*"

The italicized language is that of the Government, as shown in its brief, and it is upon that clause that reliance is placed. The last word of the paragraph is "essential," and the question at once arises, essential for what? It would only unnecessarily add to the length of this opinion, which at best, will be too long, to discuss or analyze the lease in detail. We have carefully studied its terms and we agree with the trial court that the lease was revocable only upon a decision by the Secretary of Navy

that such revocation was essential for aviation purposes. The preamble recited that "Government is the owner in fee simple * * * of the United States Naval Outlying Airfield, Arlington Heights, Ill.," that "because of its strategic value, it is considered essential that the said airfield and the
475 facilities thereon * * * be retained in a stand-by status for postwar use in connection with naval aviation activities," that "the lessee desires to lease the airfield and the facilities thereon for use as an airport and for such other uses as may be necessary or incidental to this purpose," and that such use "will in no wise be detrimental to the present activities of the Navy Department, but is on the contrary deemed to be in the best interest of the Government."

The Government argues that this preamble portion of the lease is of little or no consequence in evaluating the agreement of the parties as contained in the granting clauses which followed. This argument, however, overlooks the clause which immediately follows the preamble, "Now, therefore, in consideration of the foregoing, and of the covenants and agreements hereinafter mentioned, the Government * * * acting under the direction of the Secretary of the Navy, does hereby grant, rent, lease and demise unto the lessee * * *." We think this language made the preamble a part of the operative portion of the lease. See *Wall et al.* v. *The Chicago Park District*, 378 Ill. 81. For this and other reasons which we need not enumerate, we think the word "essential" clearly refers to aviation, the purpose for which the field had been employed and that for which the Navy desired its retention.

The Government calls our attention to the act of August 29, 1916, 34 U.S.C. 522, which was replaced by the act of August 5, 1947, 34 U.S.C. 522(a), which it is claimed precluded the Secretary of Navy from entering into a lease other than one "revocable at any time." We have read these provisions and are not convinced that they support the Government's contention. It passes all credulity that Congress would require that a lease be revocable at any time irrespective of the conditions existing or the reasons assigned therefor. More importantly, the record shows that the lease was prepared by the Secretary of Navy or his subordinates, and we think it safe to assume that they were aware of their rights under the law and acted accordingly.

In view of the holding of the trial court, which we have sustained, that the Government was precluded from relying upon its notice of revocation, we see no point in discussing it. As we have already said, the revocation provi-
476 sion of the lease is now material only as it bears upon the extent of defendant's interest in the leasehold property and consequently the compensation to which it was entitled on its taking by the Government.

We now come to the Government's contention that the court committed prejudicial error in its rulings on evidence relating to the value of defendant's leasehold interest. What we have heretofore said is dispositive to a considerable extent of the argument on this point. The general rule undoubtedly is that just compensation is to be determined by the fair cash market value of the property at the time of taking. The cases, however, recognize that this rule cannot be adhered to in situations where the property taken is unique. See *United States* v. *Two Acres of Land*, 144 F. 2d 207; *The City of Chicago* v. *Farwell et al.*, 286 Ill. 415; *The Sanitary District of Chicago* v. *Pittsburgh, Ft. Wayne and Chicago Ry. Co. et al.*, 216 Ill. 575, and *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312. Certainly the court was presented with an extraordinary situation; in fact, we doubt if there is one in the books even closely akin to it. It would be difficult for any court to determine whether each bit of evidence introduced in such a complicated situation was proper. Our consideration of the points argued by the Government leads us to the conclusion that the rulings of the trial court on the admissibility of evidence were as accurate as could reasonably be expected under the circumstances. In any event, it is our view that no prejudicial error was committed on this phase of the case.

Lastly, we come to the issue as to the authority or power of the trial court to increase the verdict of the jury by way of additur. As already noted, the jury fixed the amount of just compensation at the sum of $25,000. The court allowed additur in the amount of $50,000, and entered judgment for $75,000, together with interest from the date of taking. The Government contends that the court erred in allowing additur and in the allowance of interest on the increased amount of the judgment. As heretofore noted, additur was allowed in response to defendant's motion which prayed "that the court substantially increase the jury's verdict by an additur and

enter an amended judgment for the amount of such increased award consistent with the overwhelming evidence in
477 this case, or in the alternative, grant the defendant a new trial." The additur was allowed without the consent of and over objection by the Government.

As a basis for its action, the court entered certain findings of fact, including the following:

> "1. The Government adduced no evidence whatsoever regarding the value of the premises in question on the basis of the leasehold except on the theory that there was a cancellation of the lease which is contrary to the law and the facts.
>
> "2. The fair and just compensation for the premises in question is Seventy-five Thousand Dollars ($75,000)."

While perhaps not relevant to the question for decision, we think it should be noted that finding 1 is not supported by the record. The testimony of Government's witnesses on the issue of just compensation was not based on the theory that the lease had been cancelled but that its right to revoke was not limited to naval aviation purposes—in other words, consistent with the Government's interpretation of the lease, that it had a right to revoke for purposes other than those of aviation.

We also note that defendant has filed a cross-appeal "on the ground that said additur, in view of the evidence, is inadequate and should have been for an amount not less than $117,000 and should have resulted in a total judgment of not less than $142,000, together with interest from the date of taking of the property being condemned."

The Government in support of its position relies upon *Dimick* v. *Schiedt*, 293 U.S. 474, in which it was held that additur violated the right to a jury trial guaranteed by the seventh amendment to the Constitution. That case involved an action for personal injury in which the jury returned a verdict in favor of plaintiff in the amount of $500. Plaintiff moved for a new trial, principally on the basis that the damages allowed were inadequate. The trial court ordered a new trial unless defendant would consent to an increase of the damages to the sum of $1,500. Defendant consented to the increase, but without consent on the part of plaintiff the court denied the latter's motion for a new trial and entered judgment for the in-

creased amount. The Supreme Court held that the
478 conditional order of the trial court violated the seventh amendment of the Federal Constitution in respect of the right of trial by jury.

Defendant contends that the *Dimick* case is without application because there is no constitutional right to a jury trial in a condemnation proceeding. Such a distinction was drawn in *United States* v. *Kennesaw Mountain Battlefield Ass'n.*, 99 F. 2d 830. In this opinion of the fifth circuit, the allowance of additur in a condemnation proceeding was approved. This being the only case of which we are aware which affords any support to the action of the court in the instant matter, we think it deserves some detailed consideration. There, the court increased the jury verdict of $9,000 to $16,000, by additur. Defendant filed a motion for a new trial and the court directed that it be allowed unless the Government filed its written consent to increase the compensation to $16,000. The Government's written consent was given and the motion for a new trial denied. Both sides appealed. The court of appeals held that the Government could not complain of the allowance of additur because it had consented thereto. The condemnee, relying upon the *Dimick* case, contended that it had been denied the right to a trial by jury. The court held that the parties in condemnation had no constitutional right to a jury trial, as was the situation in the *Dimick* case. The court then stated (p. 834):

> "But if we are wrong in this, and the proceeding was a common law action with a jury trial guaranteed under the seventh amendment, still the judgment should be affirmed, because it conclusively appears from the record itself, and from the findings of the District Judge, that the trial was not attended with any error for which a new trial at common law ought to have been granted."

Thus, in *Kennesaw*, the condemnor, the party burdened by the allowance of additur, expressly consented thereto, while the condemnee opposed its allowance and urged its motion for a new trial.

In the instant case, the condemnor, the party burdened by the allowance of additur, objected thereto, while plaintiff requested a new trial only as an alternative to its motion
479 for the allowance of additur. The facts of the two cases are similar in one respect, that is, in both, the con-

demnee had no basis for a new trial other than that the amount of just compensation filed by a jury was inadequate. The court of appeals, in *Kennesaw* (p. 833), agreed with the district court that "the condemnor could not complain of the additur, because it had consented to it; the owner could not complain of it, because, there being no ground for a new trial, the addition to the verdict was in his favor."

We doubt if the court in *Kennesaw*, absent consent on the part of the condemnor, would have approved additur. In both *Dimick* and *Kennesaw*, the complaining party was the one in whose favor additur had been allowed. In both cases the complaining parties refused to agree to additur but demanded a new trial. In *Dimick*, the Supreme Court ruled additur improper on the basis that the nonconsenting party had a constitutional right to a jury trial. In *Kennesaw*, the court held (1) that the nonconsenting party had no constitutional right to a jury trial, and (2) that there was no error in the trial for which a new trial should have been granted.

We need not take issue with the holding in *Kennesaw* to reach the conclusion that it is without application in the instant situation. Here, additur was allowed at the request of defendant and over objection of the Government. The theory of additur is a corollary to that of remittitur, the former to increase an inadequate verdict, the latter to decrease an excessive verdict. It is a universal rule, so far as we are aware—in fact, the parties in the instant action so agree—that a remittitur may not be granted by a court in lieu of a new trial unless consented to by the party "unfavorably affected thereby." Even though made in a different setting, we think a statement by the court in *Dimick* is pertinent. The court stated (293 U.S. 474, 487):

> "It is worthy of note that while for more than a century the Federal courts have followed the approved practice of conditioning the allowance of a new trial on the consent of plaintiff to remit excessive damages, no Federal court, so far as we can discover, has ever undertaken similarly to increase the damages, although there are numerous cases where motions for new trial have been made and granted on the ground that the verdict was inadequate."

480 We agree that parties to a condemnation suit have no constitutional guarantee of a jury trial but, even so, it does not follow that the court, absent consent of the parties,

has the authority to increase a jury verdict by additur or decrease it by remittitur. Rule 71(A)(h) of the Federal Rules of Civil Procedure provides:

> "* * * any party may have a trial by jury of the issue of just compensation by filing a demand therefor * * * unless the court in its discretion orders that because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it."

A jury trial was ordered in the instant case; the main and perhaps sole purpose of which was, as heretofore shown, to determine just compensation for the leasehold interest sought to be taken. The trial was conducted, so we think and hold, free from prejudicial error. We are not able to embrace any logical or reasonable theory by which the court was authorized to substitute its judgment on the issue of just compensation for that of the jury, absent consent of the parties. If Congress had intended that just compensation be determined by the court, it could have easily so provided. If the court has such authority, the right to a jury trial when awarded is little more than an empty gesture. The jury is stripped of the fact-finding characteristics inherent in the traditional jury trial and its function becomes nothing more than advisory.

It is our judgment, and we so hold, that the trial court, under the circumstances, was without authority to increase the jury verdict by additur. It necessarily follows that there is no merit in defendant's cross-appeal. The judgment is reversed and the cause remanded, with directions that judgment be entered on the jury verdict in favor of defendant, together with interest thereon from the date of taking. This direction is without prejudice to the right of the court to allow defendant's alternative motion for a new trial.

481 FINNEGAN, *Circuit Judge*. Dissenting. Since it is my view that this lease had been revoked, I am unable to agree with the majority opinion.

A true copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

482 UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12191, 12192

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT-APPELLEE,

vs.

93.970 ACRES OF LAND, MORE OR LESS, SITUATE IN COOK COUNTY, STATE OF ILLINOIS, & ILLINOIS AIRCRAFT SERVICES & SALES CO., INC., DEFENDANTS-APPELLEES-APPELLANTS

Appeal from the U.S. District Court for the Northern District of Illinois, Eastern Division

Before Hon. J. EARL MAJOR, Hon. PHILIP J. FINNEGAN, and Hon. ELMER J. SCHNACKENBERG, Circuit Judges

This cause came on to be heard on the transcript of the record from the U.S. District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

Judgment

July 15, 1958

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause appealed from be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court in accordance with the opinion of this court filed this day, with directions that judgment be entered on the jury verdict in favor of defendant, together with interest thereon from the date of taking. That direction if without prejudice to the right of the court to allow defendant's alternative motion for a new trial.

483 [Clerk's certificate to foregoing transcript omitted in printing.]

484 SUPREME COURT OF THE UNITED STATES

No. 573, October Term, 1958

UNITED STATES OF AMERICA, PETITIONER

v.

93.970 ACRES OF LAND, MORE OR LESS, IN COOK COUNTY, ILL., AND ILLINOIS AIRCRAFT SERVICES AND SALES CO., INC.

Order extending time to file petition for writ of certiorari

October 4, 1958

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 12, 1958.

TOM CLARK,
Associate Justice of the Supreme Court of the United States

Dated this 4th day of October, 1958.

485 SUPREME COURT OF THE UNITED STATES

No. 573, October Term, 1958

[Title omitted.]

Order allowing certiorari

January 26, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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order was entered by Mr. Justice Clark extending the time for filing a petition for a writ of certiorari to and including December 12, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in an action to condemn "any" interest remaining in a lessee of Government property, the Government is estopped to assert that the lessee has no interest in the property because the lease was revoked.

2. Whether a lease of a Navy airfield which provided that it could be revoked upon a determination that "such revocation is essential" and which was entered into under a statute requiring that such leases be revocable "at any time," could be revoked upon a determination that the property was needed for an Army missile site.

STATUTES INVOLVED

The Act of August 29, 1916, 39 Stat. 556, 559, 34 U. S. C. (1946 ed.) 522, provided in part:

> LEASE OF NAVAL LANDS: That authority be, and is hereby, given to the Secretary of the Navy, when in his discretion it will be for the public good, to lease for periods not exceeding five years and revocable at any time, such property of the United States under his control as may not for the time being be required for public use and for the leasing of which there is no authority under existing law, and such leases shall be reported annually to Congress: * * *.

The Act of August 5, 1947, § 1, 61 Stat. 774, 34 U. S. C. 522a, provides in part:

> That whenever the Secretary of War or the Secretary of the Navy shall deem it to be advantageous to the Government he is authorized to lease such real or personal property under the control of his Department as is not surplus to the needs of the Department within the meaning of the Act of October 3, 1944 (58 Stat. 765), and is not for the time required for public use, to such lessee or lessees and upon such terms and conditions as in his judgment will promote the national defense or will be in the public interest. Each such lease shall be for a period not exceeding five years unless the Secretary of the Department concerned shall determine that a longer period will promote the national defense or will be in the public interest. The Secretary of the Department concerned may include, among other terms and conditions in the lease, a right of first refusal in the lessee to purchase the property in the event of the revocation of the lease in order to permit sale thereof by the Government, but this section shall not be construed as authorizing the sale of any property unless the sale thereof is otherwise authorized by law. Each such lease shall contain a provision permitting the Secretary of the Department concerned to revoke the lease at any time, unless the Secretary shall determine that the omission of such provision from the lease will promote the national defense or will be in the public interest. In any event each such lease shall be revocable by the Secretary of the Department concerned dur-

ing a national emergency declared by the President. * * *

STATEMENT

On October 6, 1954, the Government filed a complaint in the United States District Court for the Northern District of Illinois seeking to acquire by condemnation any outstanding interests in the United States Naval Outlying Airfield, located near Chicago (R. 9–12). Respondent, which was operating the property as an airport, claimed that it held the property under a lease from the Government and that it was entitled to compensation for the taking of its leasehold interest. The Government claimed that the lease had been revoked and denied that respondent had any interest in the property. Both the district court and the court of appeals upheld respondent's claim. The relevant facts are as follows:

On May 2, 1947, the United States and respondent executed a lease of the airfield providing in part as follows (R. 12–23):

* * * * *

> Whereas, because of its strategic value, it is considered essential that the said airfield and the facilities thereon, comprising the said United States Naval Outlying Airfield, be retained in a stand-by status for post-war use in connection with Naval Aviation activities; and
>
> * * * * *
>
> Whereas, the use of the airfield and facilities by the Lessee for such purposes will in no wise be detrimental to the present activities of the Navy Department, but is on the contrary

deemed to be in the best interest of the Government.

Now Therefore, in consideration of the foregoing, and of the covenants and agreements hereinafter mentioned, the Government * * * [hereby leases the airfield to Lessee, for use as an airport, for a five-year term ending May 1, 1952], unless sooner terminated as hereinafter provided and subject to the following conditions and covenants:

1. This lease may be terminated by the Government as hereinafter provided. Further, this lease may be terminated by the Lessee at any time after presentation of a written notice to the Government not less than sixty (60) days prior to its intention to so terminate. It is agreed that the term of this lease may be renewed by the Lessee for an additional period of five years upon the same terms and conditions as set forth herein provided that in the opinion of the Secretary of the Navy the premises are not essential for governmental purposes only.

* * * * *

14. It is understood and agreed that this lease will at all times be revocable at will by the Government upon presentation of notice of cancellation to the Lessee, in writing, sixty (60) days prior to such termination, in the event of default with regard to the covenants and conditions of the lease or in event of a national emergency and a decision by the Secretary of the Navy that such revocation is essential.

* * * * *

The lease was extended under paragraph 1 for an additional five-year term, to run until May 1, 1957 (R. 24).

In April 1954, jurisdiction over the property was transferred from the Department of the Navy to the Department of the Army (R. 11, 436), which needed the property for use as an aerial defense missile (NIKE) site (R. 46). On July 27, 1954, a notice of revocation of the lease under paragraph 14, signed by both the Secretary of the Army and the Secretary of the Navy, was delivered to respondent (R. 11, 23–25). The notice recited that a state of national emergency had been declared by the President on December 16, 1950, that possession of the property "is required for military purposes," and that both Secretaries had determined that "revocation of the said lease is essential." The notice stated that the lease "is hereby revoked, effective September 27, 1954", and demanded that respondent vacate the premises by that date. (R. 23–25.)

Respondent refused to surrender possession of the property, claiming that the lease could be revoked only for the purpose of using the property for "Naval Aviation activities," within the meaning of the preamble of the lease, and could not be revoked in order to use the property for an Army missile site.[1]

---

[1] On August 10, 1954, respondent filed a complaint seeking a declaratory judgment that the revocation was ineffective for that reason, but the complaint was voluntarily withdrawn on August 23, 1954, after the Government had asserted a lack of jurisdiction over the parties.

To obtain immediate possession, the Government, on October 6, 1954, instituted this condemnation action. The complaint (R. 9–12), to which a copy of the lease and of the notice of revocation was appended (R. 12, 23), recited that the lease had been revoked but that respondent refused to vacate the property and was "claiming an interest" therein. The complaint sought to acquire by condemnation "any possessory rights" in the property and, in particular, "all remaining outstanding right, title and interest, if any, of" respondent. The prayer was that the property be condemned, that an order be entered granting the Government immediate possession, and that "just compensation, if any" be determined and awarded. An order granting the United States possession was entered on the same day (R. 26–27).

By motions to strike respondent's answer and for summary judgment, the Government asserted that the lease had been revoked and that respondent therefore had no interest in the property. Both motions were denied and the case was set for a jury trial on the issue of valuation (R. 38–42). At the trial the court ruled that the Government, having elected to condemn respondent's leasehold interest, could not assert that the lease had been terminated and that the only issue to be tried was the valuation of the remaining term of the lease (R. 49–50, 67–68, 73, 93–94). At the close of the trial, the court (over timely objections) instructed the jury that the lease had not been canceled and was still in effect at the date of the taking; that in determining the value of the remaining term of the

lease the jury could take into account the fact that it was subject to future revocation under paragraph 14 but that it could be so revoked only upon a determination that revocation was "essential for aviation purposes"; and that the use of the property as a NIKE site was not an "aviation use" within the meaning of the lease (R. 421–422).

The jury returned a verdict finding just compensation for respondent's leasehold to be $25,000, and judgment was entered accordingly (R. 442). The Government's motion for judgment notwithstanding the verdict was, like its earlier motion for a directed verdict, denied (R. 386, 443–444). Respondent's motion for additur or, in the alternative, for a new trial on the ground of insufficiency of the verdict was granted, and, upon supplemental findings by the court that respondent was entitled to an additur of $50,000, an amended judgment was entered awarding respondent $75,000, plus interest from the date of taking (R. 446–448).

On appeals taken by both parties, the court of appeals held that the district court was without authority to allow additur and remanded the case with directions either to enter judgment on the jury's verdict or to grant the alternative motion for a new trial. On all other issues, the court, by a divided vote, affirmed the district court (App. 27–53). It held that the Government had "elected" to condemn respondent's leasehold interest rather than pursue its remedies to obtain possession under the revocation and that the Government's reliance on the revocation

"was entirely inconsistent with its condemnation complaint," since "In the same breath, the government proclaimed and denied defendant's ownership of the leasehold estate" (App. 43).

On the question of the effect of paragraph 14 on the value of the remaining term of the lease, the court held that that paragraph should be read in the light of the preamble and that, so read, the requirement in paragraph 14 of a determination that "revocation is essential" required a determination that it was essential "for aviation purposes." The court also rejected the argument that the authorizing statute required such leases to be revocable at any time, stating that it was "not convinced" that the statute supported the contention; that it "passes all credulity" that Congress so intended; and that it could be assumed that the Government acted in accordance with the statute when it prepared the lease (App. 46–47). In view of its first holding that the prior revocation was irrelevant, the court did not reach the Government's alternative contention that use of the property for a missile site ("aircraft" of a sort) was a proper reason for revocation even under the court's construction of the lease (App. 47).

REASONS FOR GRANTING THE WRIT

1. The Government needed property it had previously leased to respondent for use as a NIKE missile site. To obtain possession, it revoked the lease, claiming the right to do so under its terms and the authorizing statute. Respondent contended that the revocation was ineffective and refused to surrender

possession. The validity of the revocation could have been determined by an action in ejectment or to quiet title, but the Government could not delay construction of the NIKE site for the months or years required to conclude such an action. Moreover, it was willing to take the property by eminent domain if it was not otherwise entitled to it. To obtain immediate possession, therefore, the Government filed a complaint and a motion for possession in a condemnation proceeding. The complaint, although alleging that the lease had been validly revoked (and hence that respondent had no remaining interest in the property), nevertheless sought to acquire whatever interest respondent might be found still to possess.

The court below held that, by initiating a condemnation proceeding, the Government had foreclosed itself from asserting its rights under the revocation and hence that respondent must be deemed still entitled to possession and to compensation for the taking of that interest. In the court's view, the Government, if it wished to preserve its rights under the revocation, was required first to proceed by an independent action, such as ejectment, to obtain possession on that ground and only then, if that action was unsuccessful, initiate condemnation proceedings. Assuming, as the court of appeals did, that the revocation was valid, its holding in effect gave the Government the choice of either (*a*) paying for what already belonged to it or (*b*) postponing its taking of possession (and the installa-

tion of the NIKE site) until its ownership was established in independent proceedings.[2]

a. The importance of the question raised by that decision is manifest. Urgent governmental programs requiring acquisition of land to which the Government asserts an existing right must be delayed while that right is being litigated in independent proceedings. While the decision below would not, we believe, be followed by other courts of appeals, the risk of sacrificing the Government's independent claims to the property is one that administrative agents cannot take, and they must, therefore, forego condemnation proceedings in any case in which the Government claims an existing interest in the property until the question

[2] The suggestion of the court below (App. 41) that the Government might have obtained immediate possession by an action of ejectment, with the respondent then suing for compensation in the Court of Claims, is simply erroneous. In ejectment, possession could not have been obtained until after litigation of the merits. Apparently the court was referring to the Government's argument that it might have simply *seized* the property, under its powers of eminent domain, without benefit of judicial procedure. If so, it may be that the decision leaves it open to the Government to follow that procedure and then to assert its existing right to the property as a defense in the suit for just compensation—though it is not clear why the exercise of the power of eminent domain in that manner would be any less an "election", under the theory of the court below, than its exercise by judicial proceedings. Even if the decision could be so limited, however, it would still have serious consequences, since it would force the Government, in such cases, to abandon the orderly judicial procedure established by Congress, with its numerous protections for the condemnee, in favor of the essentially crude method of seizure, leaving the property claimant to a suit in the Court of Claims for his remedy.

of title has been settled in separate proceedings. For example, initiation of condemnation proceedings involving 700 acres of residential land on Galveston Island, Texas, to which the Government claims ownership and which probably have a value of thousands of dollars per acre, is now being postponed pending the outcome of this case. As this Court has said in a similar context, "Such a construction would be intolerable. The march of public improvement cannot thus be stayed by uncertainties, complications or disputes regarding the title to property sought to be condemned * * *." *United States* v. *Dunnington,* 146 U. S. 338, 350. The decision will likewise cause delay, inconvenience, and unnecessary expense to those claiming interests against the Government, who will be forced to protect their interests in two separate proceedings.

The question, moveover is clearly one of federal law. Even when federal condemnation proceedings were required by statute (cf. 50 U. S. C. 171) to follow local procedure, it was established that matters affecting the Government's substantive rights were governed by federal law. *United States* v. *Miller,* 317 U. S. 369. With the addition of Rule 71A to the Federal Rules of Civil Procedure in 1951, prescribing the procedure to be followed in condemnation cases, the supremacy of federal law was made complete.[3]

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[3] The scope of the analogous kinds of proceedings in Illinois state courts—which are "special, statutory and summary" (App. 39)—and the nature of the issues that can be raised in them are, therefore; clearly irrelevant. We do not concede, however, that the decision below is correct even under Illinois law.

b. The decision below is, we submit, plainly erroneous. The basic question is the scope of the issues that may properly be raised in a condemnation proceeding. The court's holding that the Government brought the wrong "form of action" (App. 41) is a return to pleading concepts long ago rejected by the Federal Rules. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley* v. *Gibson*, 355 U. S. 41, 48.

Admittedly, the Government did not intend to waive its existing rights to the property, and the court below suggests no reason why, as a matter of sound procedure, both those rights and the Government's right to condemn any interest found still to exist in respondent should not be asserted in a single proceeding. Since the Government asserted not only its present ownership of the property, but also its right to take any interests that might be found to be outstanding, it was entitled to immediate possession whatever the outcome of its ownership claim. There was therefore no obstacle to granting immediate possession and reserving the questions of ownership for resolution in determining what, if any, compensation was owing to respondent. The court below, however, concluded in effect that there was no "form of action" in which the right to immediate possession could be enforced while preserving the Government's rights of ownership. We suggest that to find the appropriate form

of action the court need only have looked to Rule 2 of the Federal Rules of Civil Procedure: "There shall be one form of action to be known as 'civil action.'"

Even on its own terms, the court's "election of remedies" rationale is unsupportable. The Government was not asserting an inchoate cause of action (*e. g.*, for a breach of contract by respondent) for which there were alternative remedies (*e. g.*, rescission of the lease or damages) among which it might elect but none of which it had yet enforced. Rather, the revocation notice, if valid, was self-executing and operated of its own force to terminate respondent's interest in the property. No judicial remedy was required to terminate the lease: if the notice was valid, it *was* terminated. Thus the court below was asked simply to recognize that the lease *had been* revoked, and not to give effect to an inchoate right in the government *to* revoke. No question of "remedies" was involved and there was posed only the problem, typical in condemnation proceedings, of ascertaining the owners of the property and allowing compensation accordingly.

Nor is there anything in the nature of a condemnation proceeding, even viewed as a limited "form of action," that makes determination of the issue of title raised by the Government inappropriate. "A condemnation proceeding is an action *in rem*. It is not the taking of rights of designated persons, but the taking of the property itself." *Eagle Lake Improvement Co.* v. *United States*, 160 F. 2d 182, 184 (C. A. 5), certiorari denied, 332 U. S. 762. For that reason

the condemnor is not "called upon to specify the interests that happen to exist." *Duckett & Co.* v. *United States*, 266 U. S. 149, 150–151. The burden is on those who claim an interest to prove their title and their right to compensation. Admittedly, disputes over title among private claimants to the property must be resolved in determining their respective rights to compensation. *E. g., Eagle Lake Improvement Co.* v. *United States, supra; National Refining Co.* v. *United States*, 160 F. 2d 951 (C. A. 8). While such cases may, as the court below suggests (App. 40), take the form simply of a litigation over the distribution of the fund, they are no more than a particular application of the principle that each claimant must establish his right to compensation. When the dispute over title is between a private claimant and the Government, the principle is no different. The question remains one of determining whether the claimant has any interest in the property, and it is essentially irrelevant whether the interest he claims would otherwise be in the Government or in someone else. Thus the precise issue in this case was not whether the Government was entitled to possession but whether respondent had any interest in the property for which he was entitled to be compensated—a question inevitably involved in any condemnation proceeding and which, we submit, must always be determined before compensation can be awarded.[4]

[4] The cases relied upon by the court below, in turn, in no way support its result. Only two of the federal decisions cited (App. 42–43) involved condemnation proceedings. The first of these, *United States* v. *Chicago, B. & Q. R. Co.*, 90 F. 2d

c. The decision below is in square conflict with the decision of the Court of Appeals for the Fifth Circuit in *United States* v. *Turner*, 175 F. 2d 644. There, the United States initiated a condemnation proceeding to acquire land which had once been submerged by navigable waters but which had been filled in by the adjacent landowner, Turner. The United States alleged that the submerged land originally belonged to the state; that the state had deeded it to the United States; that Turner acquired no interest by filling it; and hence that Turner was entitled to no compensation. The district court upheld Turner's title and granted compensation. The court of appeals reversed, holding that title to the filled land was in the United States, but remanded for a determination of what part of the land was fast land. Judge Waller, dissenting

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161, 171 (C. A. 7), certiorari denied, 302 U. S. 714, was an earlier decision of the court below and contained only a statement that *under Wisconsin law*, which at that time was deemed controlling, a condemnor was required to allege the defendant's title and was bound by that allegation. Even that statement was apparently no more than dictum, since the court went on to show that the Government had, at the trial, made no claim of ownership to the land but had "tacitly acquiesced" in the defendant's claim and that the defendant had in any event adequately established its title. The second case, *United States* v. *11.48 Acres of Land*, 212 F. 2d 853, 855 (C. A. 5), is not in point. The court there held simply that, in taking an adjacent landowner's riparian rights by condemning in fee the bed of a river, the Government had taken *more* than its dominant servitude over navigable waters and was thus required to pay for what it had taken. To the extent that it is relevant at all, the decision is, in fact, contrary to that below, since the court considered and decided on the merits the Government's assertion of its existing rights in the river.

in part, argued that the suit, initiated to acquire title by condemnation, had been converted into "a suit to try title" and that the purpose of "confirmation of a title that it already owns seems to me to be so utterly and violently inconsistent with proceedings in eminent domain as not to be permissible" (p. 649). He noted that the Federal Rules were not then applicable (though they are now) and that there was no law or rule permitting "joinder of actions so inconsistent as to be repugnant" (*ibid.*). He further argued that, even if the action was permissible, the burden ought to be on the Government to prove title, as it would be in a suit to try title.

The case thus posed precisely the same issue as that in this case. The majority of the court, however, unlike the court below, expressly rejected Judge Waller's argument (pp. 648–649):

> I do not agree that the nature of this suit as a condemnation suit has ever changed. * * * The primary object was attained of getting immediate and undisputed possession. Any right or title of the United States was not waived, but the United States, I think, stood like any other claimant of the pledged fund. [5] Turner, Alabama and the United States had initially the same burden of identifying what land or interest, if any, each owned. Neither had any presumption as against the other. It did not become a suit in ejectment, or trespass to try title, but remained a condemnation suit with a

[5] There was in fact no fund deposited: "While no money was paid into court, the credit of the United States was substituted by the statutes applicable" (p. 648).

problem to be solved as to whose land had been taken, the burden being on each claimant to identify his land. The burden of course may shift as the evidence progresses.

d. The decision is also in square conflict with that of the Court of Appeals for the First Circuit in *United States* v. *San Geronimo Development Co.*, 154 F. 2d 78, certiorari denied, 329 U. S. 718. The United States had in 1921, under special statutory authority, leased to defendant's predecessor for 999 years part of a military reservation in Puerto Rico. The lease, as required by the statute, reserved to the United States the right to "free and unlimited use, without cost," of the land during a national emergency. Upon the outbreak of World War II, the United States asserted its right to use the land, but the defendant claimed that the reserved right had been terminated by a Presidential Proclamation in 1929 (which had conveyed certain property to the People of Puerto Rico). The United States filed a complaint seeking to acquire by condemnation the "temporary use and occupancy" of the land for the duration of the war, but asserting the right to that use under the original lease. The court of appeals, in an opinion by Judge Magruder, noted the unusual feature of the complaint, in that the United States was claiming an existing right to the very use it sought to condemn, but said (p. 83):

> * * * The validity of its claim to the right of free user might be tested by a complaint for a declaratory judgment or by a bill for specific performance of the provisions of the Baker

lease, or by some appropriate possessory action. In its petition the United States asked in effect for an adjudication that its right reserved in the Baker lease was valid and subsisting and entitled it to the wartime use and occupation of the premises for naval purposes without compensation to the various persons holding subleases derived from Baker; and, in the alternative, if that claim should be denied, it asked for a judgment condemning an interest in the tract and determining the amounts of just compensation payable to the various respondents named in the petition. Under the peculiar circumstances, there was much good sense in combining these alternative and mutually exclusive theories in a single proceeding, and we are not prepared to say that the procedure followed was inappropriate.

The court then held that the United States was entitled to use of the land under the lease without compensation and directed entry of a judgment so declaring. The court below disposed of this case as having "reluctantly" upheld the procedure as an "unfamiliar hybrid" (App. 40–41) but failed otherwise to distinguish it. While we question the characterization of Judge Magruder's opinion as "reluctant," the conflict, like the dragon, is no less real for that reason.

Other decisions which conflict in result with the decision below, though the issue was not expressly discussed, are noted in the margin.[6]

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[6] *Wittmayer* v. *United States*, 118 F. 2d 808 (C. A. 9): A complaint condemning property patented to defendant and the subsequent accretions thereto from the Missouri River was later amended to allege that the accretions were in the public do-

2. The second question presented is one of construction of the lease and, more importantly, of the leasing statute—*i. e.*, whether the Government had a right to revoke the lease to use the property for a missile base. If it did, then, on the one hand, the revocation was valid and respondent had no interest in the property. On the other hand, even if there had been no previous revocation (or, as the court below held, the Government was estopped to assert it), the existence

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main and did not belong to defendant. The issue of title to the accreted lands was tried to the court, which entered judgment quieting title in the United States. The court of appeals affirmed.

United States v. *10,245 Acres of Land*, 50 F. Supp. 470 (E. D. Wash.): In a condemnation proceeding against land claimed as a homestead, the Government was allowed to show that the claimant had failed to make improvements within the time required in order to perfect his homestead title and hence that his inchoate title, being subject to cancellation of his entry at any time, was worthless. The court rejected the claimant's argument, analogous to that of the court below, that the Government was "bound by its deposit [of the estimated value of the land] and is estopped from contesting defendant's right to secure at least the amount deposited" (p. 472).

An analogous case, though perhaps not in actual conflict, is *Tennessee* v. *United States*, 256 F. 2d 244, 256–257 (C. A. 6). The state had acquired in fee and deeded to the United States the right-of-way for a highway. A telephone company claimed a permanent easement over the right-of-way for its existing telephone line, while both governments contended that the company had only a permissive right and was required, under state law, to relocate its line so as not to obstruct the highway. To resolve the issue, the United States initiated a condemnation proceeding to condemn all interests in the land that it did not already possess. Without question, the United States was allowed to assert (successfully as to part of the line) both its and the state's rights to require relocation of the line without compensation.

of the *right* to revoke the lease for that purpose would have made the respondent's interest of no substantial value. At the date of the taking, it was known that the Government needed the property for a missile base and hence known that, had there been no condemnation, the Government would have promptly exercised its right to revoke the lease. If the Government had that right, respondent's defeasible interest was worth only the value of the use of the property during the 60-days' notice that would be required for the exercise of that right—simply a reasonable period in which to vacate the premises, and of no significant value. Thus the question of the scope of the right of revocation is the same whether or not the prior revocation is to be given effect. In short, under our view of the lease and statute, either respondent had no interest in the property (because of the prior revocation) or the defeasible interest it did have was of no substantial value (because of the impending revocation).

The court below held, however, that the lease could be revoked only upon a determination that revocation was "essential for aviation purposes".[7] That hold-

[7] Both courts below, having held that the prior revocation could not be asserted, dealt with the question solely in terms of the effect of the right of revocation on the value of the remaining term of the lease. The district court instructed the jury that the right could be exercised solely for "aviation purposes" and that use of the property as a missile base was not such a purpose (R. 421). Since the evidence disclosed that there was no existing need of the property for "aviation purposes" as thus limited (*e. g.*, R. 432–434), there was, under that construction, little likelihood of the lease being revoked before

ing, we submit, was based on an erroneous interpretation not only of the lease itself but also of an important federal statute.

a. The sole basis for the court's interpretation is the recitation in the preamble of the lease that "it is considered essential that the said airfield * * * be retained in a stand-by status for post-war use in connection with Naval Aviation activities."[8] On its face, however, that statement was simply a recital of the justification for the Department's keeping the property in a stand-by status (by leasing it) rather than declaring it surplus and disposing of it, and was in no way directed to the scope of the reserved right of revocation. Paragraph 14, in turn, imposes no limitation of "purpose" but provides, without qualification, that the lease shall be "revocable at will * * * in event of a national emergency and a decision by the Secretary of the Navy that such revocation is essential." The answer to the court's question "essential for what?" (App. 45), if one is needed at all, is to be found not in the unrelated recitals of the pre-

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expiration of the remaining term (2 years and 8 months), and the jury clearly so concluded.

The court of appeals held that the right to revoke was exercisable only "for aviation purposes" but thought it unnecessary to decide whether use of the property as a missile base was within such "purposes" (App. 47). However, since such use presented the only practical likelihood of the lease being revoked and the jury had obviously based its verdict on the instruction that the lease could not be revoked for that purpose, it was clearly error to affirm the judgment without considering that question.

[8] All the relevant parts of the lease are set forth in the Statement, *supra*, pp. 4–5.

amble but in the directly analogous provision in paragraph 1 that the lease could be renewed for an additional term only if the Secretary found that the property was "not essential for governmental purposes only." If significant at all, the lack of the same qualification in the otherwise similar revocation provision means that the latter provision was, if anything, to be less restrictive. Finally, that the broad scope of the Government's revocation rights was neither unintended nor harsh is shown by the fact that the respondent was given an even broader right to terminate the lease "at any time" (¶ 1).

b. While we believe the error of the decision below is apparent from the terms of the lease itself, of greater concern is the court's holding that its construction of the lease does not contravene the express provisions of the authorizing statutes that such leases are to be revocable "at any time."[9] The statutes are unequiv-

[9] Acts of August 29, 1916, and August 5, 1947, *supra*, pp. 2–4. The 1916 Act authorized the Secretaary to lease property "for periods not exceeding five years and revocable at any time." The 1947 Act provided that each lease "shall contain a provision permitting the Secretary * * * to revoke the lease at any time." It then provided that the revocation provision might be omitted upon a "public interest" determination but that "In any event each such lease shall be revocable by the Secretary * * * during a national emergency."

Since the two Acts are substantively the same in all aspects relevant here, it is unnecessary to decide whether the instant lease is controlled by the 1916 Act, in effect when the original lease was executed, or by the 1947 Act, in effect when the lease was renewed for an additional five-year term. If the renewal were pursuant to a binding option in respondent, arguably the 1916 Act should govern. However, since the 1916 Act prohibited leases exceeding five years, it would seem that the ex-

ocal and leave little room for construction.[10] The court of appeals, indeed, attempted no such construction but contented itself with the assertion that Congress could not have intended what the statutes seem clearly to say. Even that, however, misconceives the purpose of the leasing authority, which was not to make landlords of the military departments but simply to provide an economical way of keeping essential defense facilities in a state of readiness, or "stand-by", until needed. The revocable lease keeps the facilities available upon call, effects their maintenance in the meantime, and permits a beneficial interim use. The pervading concept, in short, is the priority of military needs, with private use being authorized only pending a military need.[11] See, *e. g.*, S. Rep. No. 626, 80th Cong., 1st Sess. pp. 2–8.

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tension could be given effect only as a new agreement between the parties. The broad power of the Secretary to refuse the extension (see ¶1) also suggests that result. For these reasons, it is our view that the 1947 Act is controlling. As already noted, however, there seems no need to resolve that issue.

[10] The court of appeals does not, and of course could not, question that any right of revocation required to be reserved by the statutes would be binding upon lessees taking under them. See, *e. g.*, *Todd Dry Dock & Constr. Corp.* v. *Sumner Iron Works*, 289 Fed. 217, 220 (C. A. 9), certiorari denied, 263 U. S. 700. The right of revocation during a national emergency provided by the 1947 Act, moreover, does not even in form require a revocation provision to be included in the lease but is operative of its own force. See note 9, *supra*.

[11] The 1947 Act, by authorizing a right of first refusal to be given the lessee, expressly contemplates that such leases may be revoked for the sole purpose of selling the property (see p. 3, *supra*).

In view of the extensive use of "stand-by and maintenance" leasing arrangements by all three military departments and the obvious need, in times of rapidly-developing crises, of maximum flexibility in recalling leased defense facilities into service, the question of the revocability of such leases under the leasing statutes is of widespread importance.[12] While the effect of the decision below might be avoided as to future leases by even more explicit terms than here, no doubt many of the leases now outstanding are subject to the same kind of interpretation as that adopted below.[13] In addition, one of the very purposes of imposing a statutory requirement of revocability would seem to

[12] The 1947 Act (see note 9, *supra*) applies to all the military departments. See 5 U. S. C. 626s–3; 10 U. S. C. (Supp. V) 2667; 34 U. S. C. 522a.

[13] Compare, for example, the recent decision of the Court of Claims in *Hingham Management Corp.* v. *United States*, No. 219–54 (Oct. 8, 1958). There the preamble of the lease recited that the facilities "are not, for the time being, required for public use," while the termination provision provided, in accordance with the 1947 Act, that the lease could be terminated "at any time * * * During any national emergency." The Government, believing that the lessee was misappropriating property from the leased premises, terminated the lease under that provision and re-let the property on the same day to another lessee. The Court of Claims rejected the lessee's contention (in a suit for damages) that the right of termination was impliedly limited to circumstances when the property is needed in connection with the national emergency or for a public use and held that the reserved right of termination was "absolute and unconditional". (As an alternative holding, the court also pointed out that the purpose of protection of the facilities from misappropriation was sufficiently related to the national emergency to justify the termination even if the lessee's argument were accepted.) Although the precise terms of the leases are different, the decision below conflicts at least in principle with that of the Court of Claims.

have been to avoid reliance solely on administrative officers adequately to protect the Government's interests in drafting such leases and to make clear beyond doubt that all such leases are fully revocable. That purpose is frustrated by the decision below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully,

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DECEMBER 1958.

APPENDIX

In the United States Court of Appeals for the Seventh Circuit

October Terms, 1957—April Session, 1958

Nos. 12191–12192

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT, APPELLEE

v.

93.970 ACRES OF LAND, MORE OR LESS, SITUATE IN COOK COUNTY, STATE OF ILLINOIS, AND ILLINOIS AIRCRAFT SERVICES AND SALES COMPANY, INCORPORATED, DEFENDANT-APPELLEE, APPELLANT

July 15, 1958

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Before MAJOR, FINNEGAN, and SCHNACKENBERG, *Circuit Judges*

MAJOR, *Circuit Judge:* This is a condemnation proceeding instituted by the United States to acquire all outstanding rights, if any, which defendant had in premises in Cook County, Illinois, on which was located an airport, under lease from the government. The lease under which defendant occupied the premises was executed May 2, 1947, with certain modifications made February 9, 1948. The lease granted to lessee (defendant) the option of renewing the lease for a period of five years. This the lessee did. Thus,

the lease as renewed extended to May 2, 1957. The lease contained a provision which authorized its revocation by the lessor under certain conditions, subsequently discussed. The government sought to exercise this power of revocation, effective September 27, 1954. Copies of the lease, the amendment thereto and the government's notice of revocation are attached to and made a part of the complaint.

Defendant refused to honor the notice of revocation and vacate the property. On August 10, 1954, it sought in the District Court a declaratory judgment that the revocation was ineffective because the government proposed to use the property for purposes other than those described in the lease as a basis for its right to revoke. The defendants in that action refused to waive immunity and moved to dismiss the complaint for lack of jurisdiction. Thereupon, plaintiff in that action withdrew its complaint. The government instituted the instant action October 6, 1954, and was awarded immediate possession of the premises, with certain reservations not here material. The government by its condemnation action sought to acquire "all remaining outstanding right, title and interest, if any" of defendant in the property and to ascertain "just compensation, if any."

Defendant in its answer to the complaint sought just compensation for the remaining term of the lease, that is, for a period of about 2½ years, or until May 1, 1957. It admitted receiving the notice of revocation but alleged that it was ineffective because it was not made in conformity with the terms of the lease. Defendant's answer also alleged that in filing a condemnation action, instead of ejectment or a similar action, the government elected "a remedy which is inconsistent with the theory that defendant has no possessory right and therefore implicitly recognizes

the existence of a leasehold interest and is precluded as a matter of law from asserting that the lease has been terminated."

The government moved to strike defendant's answer, and for findings and judgment that defendant was not entitled to possession after September 27, 1954, and was, therefore, entitled to no compensation. The basis for the motion was that the answer set up no valid defense because defendant's tenancy expired by reason of the revocation, notice of which defendant admittedly received, which effectively terminated its interest on September 27, 1954, and for the further reason that the necessity for taking by the government was not a matter for judicial inquiry. Upon denial of this motion, the government moved for summary judgment of no compensation on the basis that there was no issue of fact concerning the lease and its revocation and that as a matter of law the lease was validly revoked prior to commencement of the action. This motion was also denied.

The case was tried before a jury on the issue of compensation. At the inception of the trial the Court ruled that the government could not introduce in evidence or make any reference to the revocation notice, for the reason that it had selected the remedy of condemnation which necessarily acknowledged an outstanding leasehold interest in defendant for the full part of the term remaining, October 6, 1954 to May 1, 1957. Much testimony was offered by each of the parties as to the value of the remaining leasehold interest. It is unnecessary at this point to relate this testimony. It is sufficient to note that the witnesses for the government, based on its interpretation of the lease, testified that the interest sought to be taken had no value and as a result the government was entitled to a finding of no compensation. On the other hand,

defendant's witnesses, based on its interpretation of the lease, placed various estimates upon the value of defendant's remaining interest in the lease.

At the conclusion of the evidence, the government's motion for a directed verdict of no compensation was denied. Consistent with this ruling and also with that made at the inception of the trial, the Court denied the government's request for the submission to the jury of a form of verdict which would have permitted a possible finding of no compensation. The jury returned a verdict in the amount of $25,000, and on April 16, 1957, judgment was entered in said amount in favor of defendant. After a consideration and disposal of various motions the Court, on July 9, 1957, filed findings of fact and conclusions of law wherein it found and concluded that defendant was entitled to an additur of $50,000 (making a total base award of $75,000), with interest at 5% from October 6, 1954, the date of taking. On the same date the Court entered what it labeled an "amended judgment," in which it was recited that defendant was entitled to an award of $85,375.02. It is evident that this judgment included $50,000, the amount allowed as additur; $25,000, the amount awarded by the jury, and $10,375.02, interest on the sum of $75,000 from the date of taking.

The government has appealed from the so-called amended judgment of July 9, 1957. No mention is made in its notice of appeal of the judgment entered April 16, 1957 (the first judgment). Defendant cross-appealed from the so-called amended judgment of July 9, 1957 (the second judgment) in its favor, on the ground that the Court erred in failing to increase the award to the lowest level of value established by uncontradicted testimony. This so-called uncontradicted testimony refers to that offered by defendant

upon its theory of the case, which was that embraced by the trial Court.

We are met at the inception with the important and troublesome contention advanced by defendant that the government, having appealed only from the so-called amended judgment of July 9, 1957, is precluded from here raising any issue other than that relative to the allowance of an additur. More specifically, it is contended that the government by its failure to appeal from the judgment of April 16, 1957, is without right to a review of the issues both of law and fact which were raised and decided in the trial which resulted in that judgment. The importance of this contention is at once apparent because, if sustained, it is decisive of all issues other than that which relates to the Court's allowance of the additur. We have, therefore, up to this point stated only such of the proceedings as we deem essential to bring into focus the instant question.

It is hardly open to doubt but that the first judgment standing alone was final and, therefore, appealable. It is equally certain that the Court, either on its own volition or at the instigation of the parties, possessed the authority within an appropriate time to vacate, modify or amend that judgment. We also think that in determining the question of the finality of the first judgment it should not be confined in a vacuum, separate and apart from the proceedings which followed.

On April 22, 1957, the government filed its motion to vacate the April 16 judgment and prayed that a judgment of no compensation be entered for plaintiff, notwithstanding the jury verdict. On April 24, 1957 (eight days after the entry of the judgment), defendant filed its motion calling attention to the fact that the judgment did not include interest, and prayed

"that the judgment heretofore entered herein be altered or amended" to include interest. On the same date, defendant filed its motion for additur or, in the alternative, for a new trial. In this motion defendant prayed "that the Court substantially increase the jury's verdict by an additur and enter an amended judgment for the amount of such increased award" or, in the alternative, grant defendant a new trial.

Thus, in two respects defendant sought to amend the judgment: first, by the addition of interest and, second, by the allowance of an additur. That the defendant succeeded in both respects is evidenced by the fact that the second judgment included interest and the allowance of an additur. The second judgment also specifically included $25,000, the amount of the jury award, which had been incorporated in the first judgment. It is not discernible how it can be logically held that there are now two final judgments (defendant's contention requires such a holding). It is certain that defendant would not be entitled to a satisfaction of both judgments. Satisfaction of the second would *ipso facto* satisfy the first. Conversely, satisfaction of the first would entitle the government to a *pro tanto* credit on the second. In our view, the first judgment was merged in and became a part of the second. By such merger the first judgment was obliterated as effectively as if it had been expressly vacated by the Court. It is evident that the parties as well as the Court intended such result. Moreover, the result was accomplished at the behest of defendant which, as shown, was urging the Court to enter an "amended judgment," not another judgment separate and distinct from the first.

Defendant in its brief asserts that its contention on this issue is "completely supported" by the follow-

ing cases: *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U. S. 206; *Durkin* v. *Mason & Dixon Lines, Inc.*, 202 F. 2d 425, and *Delta Drilling Co. et al.* v. *Arnett*, 186 F. 2d 481. In our view, these cases furnish feeble, if any, support for defendant's contention. It is pertinent to note that none involved a condemnation proceeding. In the *Honeywell* case there was involved a cease and desist order issued by the Federal Trade Commission, and the question before the Court was whether the petition for certiorari has been filed in the time designated by statute. A solution of this question required a determination as to when the statutory period commenced to run, that is, from an order of July 5, 1951 or from an order of September 18, 1951 (orders of this Court on petition for review). True, the Court held that the first order was final, but upon the basis that it had not been substantially altered by the second order. As the Supreme Court stated concerning the second order (page 212), "It reiterated, without change, everything which had been decided on July 5." Relative to the issue of finality, the Court in its discussion stated (page 212):

> The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.

The *Durkin* case involved an action for failure to pay overtime wages. Two periods of time were involved. As to the first, the trial Court dismissed the claim, but allowed recovery as to the second for an amount which was to be determined in accordance with a pre-trial stipulation of the parties. The Court of Appeals held that the order was final because it

"settled all the equities between the parties and finally determined their rights."

The *Arnett* case involved the title to or ownership of certain oil and gas rights, with a prayer for an accounting. Two judgments were entered in the case and the Court of Appeals held that the first judgment was final because it settled the case on the merits. Nothing was added to the second judgment other than the result which flowed from an accounting which had been provided for by the first judgment.

It appears settled by the cases that just compensation is a material issue in every condemnation suit and that there can be no finality of judgment until this issue is definitely disposed of. In *McCandless et al.* v. *United States,* 298 U. S. 342, 348, the Court stated:

> In an eminent-domain proceeding, the vital issue—and generally the only issue—is that of just compensation.

In *Catlin et al.* v. *United States,* 324 U. S. 229, the Court had before it the issue of the finality of a judgment in a condemnation proceeding. In its discussion the Court made the following pertinent statement (page 233):

> Hence, ordinarily in condemnation proceedings appellate review may be had only upon an order or judgment disposing of the whole case, and adjudicating all rights, including ownership and just compensation, as well as the right to take the property. This has been the repeated holding of decisions here.

The same rationale was followed in *United States* v. *Richardson,* 204 F. 2d 552, 555.

We are not able to discern how it can be held that the first judgment, in view of subsequent proceedings, disposed of the whole case or that defendant can con-

sistently contend that it was an award of just compensation for the property right sought to be taken. This is so even though it be thought that such judgment standing alone possessed all the indicia of finality under the rationale of the Supreme Court in *Catlin*. Its finality, if such it had, at the time of entry was emasculated by subsequent proceedings which culminated in the second judgment from which the appeal is taken. It is, therefore, our view and we so hold that the government by its appeal from the second judgment is entitled to a review of the issues which it here presents.

We now come to the contested issues relating to the proceedings in the District Court. As stated in the government's brief (with no objection on the part of defendant), they are as follows:

> 1. Whether, in this condemnation proceeding by the United States to reacquire possession and to clear title to property which it had leased to Illinois Aircraft Company, the district court erred in refusing to enter judgment of no compensation on the basis of prior revocation of the lease because it ruled (*a*) that the use of a condemnation action constituted election of a remedy which admitted an outstanding leasehold interest and (*b*) that the lease had not been validly revoked under its terms.
>
> 2. Whether, on the issue of the value of the remaining term of the leasehold which had to be tried under the foregoing rulings, the court erred (*a*) in stating before the jury that it would set aside a verdict of no compensation, (*b*) in receiving evidence of gross and net income from the airport operation or the trailer and barracks housing operation, (*c*) in receiving piecemeal valuations for the separate operations on the property and (*d*) in receiving evidence of value based on a construction that the lease was not revocable except "for Naval avia-

tion uses" and that it authorized use of the property for a trailer park and barracks housing not related to the airport function.

3. Whether the court erred in trebling the verdict of the jury by purported additur and in awarding interest on the enlarged award.

Defendant enumerates other contested issues, all of which relate to the additur which the Court included in its second judgment of July 9, 1957. These issues are here by reason of defendant's cross-appeal. They need not be stated at this point as their relevancy will depend upon our disposition of the issues raised by the government.

Prior to the commencement of the trial, the Court ruled that the government could not introduce in evidence or make any reference to the revocation notice (which the government had served on defendant), on the ground that the government had selected the remedy of condemnation, which necessarily acknowledged an outstanding leasehold interest in defendant for the unexpired portion of the lease, that is, from October 6, 1954, to May 1, 1957. In connection with this ruling the Court stated:

> The court presumes that the Government knew what it was doing, it had some advantage to gain by filing a proceeding under condemnation rather than following the other procedure, which raised a very highly technical point in controversy which the Government sought to avoid, and properly, in my judgment.

Also, at the beginning of the trial, the Court stated in the presence of the jury:

> If they [the jury] found no money at all, counsel, I would be compelled to grant a new trial, and we would be wasting their time, and this should not be submitted to the jury except on the basis of finding a fair value, and no value

> would be just the kind of a verdict I would have to reverse.

Consistent with this ruling, the Court denied a request by the government for a directed verdict and also a request that there be submitted to the jury a form of verdict to be used in the event the jury found that defendant was entitled to no compensation.

The parties devote much effort to the question as to whether the issue of election of remedies in a condemnation suit is to be determined by Federal or State law. In our view, we need not be concerned with this question because the reasoning employed by both the Federal and State courts of Illinois leads to the same result. A more disturbing matter is the dearth of cases in both jurisdictions which have considered the doctrine in condemnation proceedings.

We shall first refer to Federal cases other than those in condemnation, where the doctrine has been discussed and applied. In *Henderson Tire & Rubber Co.* v. *Gregory et al.*, 16 F. 2d 589, 593, the Court cites many cases in support of the statement that the doctrine is widely recognized both in Federal and State courts. From the cited cases the Court concluded:

> (1) The essential elements of the doctrine are (*a*) the existence of the two remedies; (*b*) the inconsistency between the remedies; (*c*) the choice of one of the remedies.

The doctrine was applied in *Intertype Corp.* v. *Pulver*, 2 F. Supp. 4, 6 (affirmed 65 F. 2d 214). In that case it was held that replevin would not lie because plaintiff had previously sought unsuccessfully to foreclose a chattel mortgage on the same property. In *Van Winkle et al.* v. *Crowell et al.*, 146 U. S. 42, it was held that a seller was precluded from maintaining an action of detinue to recover property after at-

tempting, although unsuccessfully, to enforce a lien thereon. In *United States* v. *Oregon Lumber Co. et al.*, 260 U. S. 290, it was held as to a voidable sale of land on account of fraud that the plaintiff was entitled to either disaffirm and recover the lands or affirm and recover damages for the fraud, but that it could not do both. After holding that the rule was applicable to the government, the Court stated (page 295):

> Any decisive action by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and one of the most unequivocal of such determinative acts is the bringing of a suit based upon one or the other of these inconsistent conclusions.

Of the numerous other instances where the doctrine under consideration has been recognized in the Federal courts, see *Bierce* v. *Hutchins*, 205 U. S. 340, 346; *Zimmerman* v. *Harding*, 227 U. S. 489, 33 S. Ct. Rep. 387, 389.

Now, turning to Illinois cases, we note those wherein the doctrine has been applied in condemnation proceedings. In *The Metropolitan City Railway Co.* v. *The Chicago West Division Railway Co.*, 87 Ill. 317, the Court stated (page 322):

> Petitioner, after invoking the aid of the law to condemn certain property of defendant, will not be permitted to stultify itself by insisting defendant has no interest in that which it seeks to condemn to its own use under the Eminent Domain Act.

In *The Sanitary District of Chicago* v. *Pittsburgh, Ft. Wayne and Chicago Ry. Co. et al.*, 216 Ill. 575, the Court held that the averments of the petition as to defendants' interest or title were binding on peti-

tioner but not on the defendants. The Court stated (page 579):

> If a corporation entitled to exercise the right of eminent domain claims that it already has a right to take land, a petition for condemnation is not the proper proceeding to try that question. It was the duty of the petitioner to ascertain the title to the premises before commencing the proceeding and to name in the petition the owner of the premises, and if the title was less than a fee simple or subject to an easement it should have been stated in the petition.

In *The Department of Public Works and Buildings* v. *Otto F. Sohm,* 315 Ill. 478, the Court in a condemnation case, on facts similar in many respects to those of the instant case, held that the right of possession was not a proper issue in condemnation but that it should be determined in ejectment. The Court among other things stated (page 483):

> The proceeding is special, statutory and summary, its sole object is to ascertain the compensation to be paid, and the amount is the only issue.

The Court reiterated what it had previously held, that averments in the petition as to title are binding on petitioner and that petition for condemnation is not a proper proceeding to vindicate a right which petitioner otherwise has to take the land.

The Federal courts recognize, as do the Illinois courts, that the sole object of condemnation is to ascertain just compensation for that which is taken. Reiterating our previous quotation from *McCandless et al. v. United States,* 298 U. S. 342, 348:

> In an eminent-domain proceeding, the vital issue—and generally the only issue—is that of just compensation.

In *Danforth* v. *United States,* 308 U. S. 271, 284, the Court stated:

> Condemnation is a means by which the sovereign may find out what any piece of property will cost.

The government argues that claims based on liens or contracts may be settled, and clouds on titles resolved, in condemnation proceedings. This is true no doubt where such claims or rights are incidental to the taking of property, for which just compensation is to be awarded. The government in support of this contention cites *Eagle Lake Improvement Co. et al.* v. *United States,* 160 F. 2d 182, and *National Refining Co.* v. *United States,* 160 F. 2d 951. Neither case is of any aid to the government. In the *Eagle* case the question was as to the manner of dividing the compensation award between a fee owner and a lessee. However, the Court made the pertinent observation (page 184):

> A condemnation proceeding is an action *in rem*. It is not the taking of rights of designated persons, but the taking of the property itself.

The *National Refining* case is even more remote. In that case the compensation award was paid by the government into the registry of the Court and the litigation was between rival claimants to the fund.

The government asserts that condemning property of which it claims ownership is common practice. In support of the statement it cites *United States* v. *San Geronimo Development Co., Inc., et al.,* 154 F. 2d 78; *Wittmayer et ux.* v. *United States,* 118 F. 2d 808, and *United States* v. *10,245 Acres of Land,* 50 F. Supp. 470. The nebulous support which these cases furnish the government's assertion is an indication of the

weakness of its position. In none was it sought to invoke the doctrine of election of remedies. It is true that in the *San Geronimo* case the Court reluctantly approved a petition for condemnation which contained a provision that it was without prejudice to the right of the government to dispute the claim of any party for compensation. The Court did this after characterizing the proceeding (page 80) as an "unfamiliar hybrid, and the substantive question upon which the decision turns is a special and non-recurring one as to which there are no precedents to indicate the answer." There is nothing in *Wittmayer* of any pertinency. In the *10,245 Acres of Land* case, the government in connection with the declaration of taking made a deposit of estimated value. It developed, however, that the person who laid claim to the homestead (the premises sought to be condemned) had not perfected his rights and had no interest therein. In the action reported it was held that the government was entitled to a return of its deposit. The case has no bearing here.

The government points out what undoubtedly is a fact, that it might have proceeded in ejectment in order to secure possession. From this premise it argues that the defendant has not been hurt by the instant proceeding because if the government had obtained possession in an ejectment action, defendant would have been relegated to the filing of a claim in the Court of Claims, to which the government could have pleaded that it had no interest because of the revocation of the lease. In our view, this argument is beside the issue. We are not concerned with what the rights of the parties might have been had the government proceeded in some other form of action. We are now concerned only with the rights in the con-

demnation proceeding which the government elected to pursue.

Defendant places much reliance upon a decision of this Court, *United States* v. *Chicago, B. & Q. R. Co.*, 90 F. 2d 161. In that case the government contended that the defendant had failed to establish any interest in a certain portion of the condemned property. The Court, after noting that the action was prosecuted in accordance with the laws of Wisconsin, stated (page 171):

> It is the law of that state that where proceedings are instituted to condemn property, and the petition recites, as it must, title and ownership or interest by the defendant, the condemnor is thereby bound by such expressed recognition of title, and cannot be heard to assert the contrary nor compel one recognized as owner to prove or defend his title.

The Wisconsin rule thus announced and followed by this Court is no different, as previously shown, from that adhered to by the courts of Illinois.

In *United States* v. *11.48 Acres of Land*, 212 F. 2d 853, the Court employed similar reasoning and reached the same result. In that case the government condemned the fee simple title and attempted to defeat the payment of just compensation on the contention that the contemplated use would be a mere exercise of the government's dominant servitude over navigable waters. In short, the government contended that it should not be required to pay just compensation because it had an existing right to use that which it sought to condemn. The condemnee argued "that the Government has elected to take his riparian rights by eminent domain and that he is therefore entitled to just compensation." The Court, in sustaining the latter contention, stated (page 855):

> We think that the appellee's alternative contention is sound, and, hence, we do not reach the question of whether the use intended by the Government would be a mere exercise of its servitude over navigable waters. Appellee's property was always subject to that dominant servitude. Its exercise involved no taking of private property within the meaning of the Fifth Amendment, and necessitated no condemnation proceeding. The United States has elected to take the fee simple, absolute, and indefeasible title to the lands.

The government concedes that it had remedies, other than that of condemnation, by which it might have obtained possession of the property in controversy. This it could have done without the payment of any compensation on its theory that defendant's interest in the leasehold property had been extinguished by the government's revocation made in conformity with the terms of the lease. Instead, it elected to institute the instant action to condemn defendant's leasehold interest. It thus, as must be done in all condemnation cases, invoked the jurisdiction of the Court for the purpose of determining just compensation to be awarded for that which it sought to condemn. In reality, that was the sole issue to be tried in the District Court.

In our view, the trial Court properly ruled that the government was without right to rely upon its purported revocation of the lease. Such a position was entirely inconsistent with its condemnation complaint. In the same breath, the government proclaimed and denied defendant's ownership of the leasehold estate. Such an absurd position is not countenanced by law, as we understand it, and neither is it supported by logic, reason or common sense.

This brings us to the rulings of the Court as well as the testimony of the respective parties relative to the just compensation to be awarded. This requires some consideration of the terms of the lease, because the extent of defendant's claim or interest in the leasehold estate is dependent upon such terms. This is forcibly illustrated by the testimony of the witnesses for the respective parties on the issue of just compensation. Witnesses for the government, based upon its interpretation of the lease, testified that defendant's interest had no value, while defendant's witnesses, predicated upon its interpretation, testified that defendant's interest had great value.

The lease, as already shown, was executed May 2, 1947, for a term of five years, and was between the Navy Department, on behalf of the United States of America, and defendant. Defendant, exercising an option contained in the lease, renewed it for an additional five-year term. On April 28, 1954, at the request of the Department of the Army, jurisdiction of the premises was transferred by the Navy Department to the Department of the Army and the lease was formally assigned to it. Defendant was notified of the transfer and tendered rental to the new agency designated.

There is no question but that the lease conferred upon the government the power of revocation. The controversy concerns the manner, purpose and by whom such power might be exercised. The government's theory, rejected by the trial Court, is that it could revoke at any time and apparently for any purpose. On the other hand, defendant contends, and the trial Court held, that the lease was revocable only upon "decision by the Secretary of the Navy that such revocation is essential for aviation purposes." It is not disputed on either theory but that the lease could

be revoked only in the event of a national emergency, that such emergency had been declared by the President on December 16, 1950, and was in existence at the time of the execution of the lease and still is in existence.

The heart of the controversy resides in paragraph 14 of the lease, as follows:

> It is understood and agreed that this lease will at all times be revocable at will by the Government upon presentation of notice of cancellation to the Lessee, in writing, sixty (60) days prior to such termination, in the event of default with regard to the covenants and conditions of the lease or *in event of a national emergency and a decision by the Secretary of the Navy that such revocation is essential.*

The italicized language is that of the government, as shown in its brief, and it is upon that clause that reliance is placed. The last word of the paragraph is "essential," and the question at once arises, essential for what? It would only unnecessarily add to the length of this opinion, which at best will be too long, to discuss or analyze the lease in detail. We have carefully studied its terms and we agree with the trial Court that the lease was revocable only upon a decision by the Secretary of Navy that such revocation was essential for aviation purposes. The preamble recited that "Government is the owner in fee simple * * * of the United States Naval Outlying Airfield, Arlington Heights, Illinois," that "because of its strategic value, it is considered essential that the said airfield and the facilities thereon * * * be retained in a stand-by status for post-war use in connection with Naval Aviation activities," that "the Lessee desires to lease the airfield and the facilities thereon for use as an airport and for such other uses

as may be necessary or incidental to this purpose," and that such use "will in no wise be detrimental to the present activities of the Navy Department, but is on the contrary deemed to be in the best interest of the Government."

The government argues that this preamble portion of the lease is of little or no consequence in evaluating the agreement of the parties as contained in the granting clauses which followed. This argument, however, overlooks the clause which immediately follows the preamble, "Now Therefore, in consideration of the foregoing, and of the covenants and agreements hereinafter mentioned, the Government * * * acting under the direction of the Secretary of the Navy, does hereby grant, rent, lease and demise unto the Lessee * * *." We think this language made the preamble a part of the operative portion of the lease. See *Wall et al.* v. *The Chicago Park District*, 378 Ill. 81. For this and other reasons which we need not enumerate, we think the word "essential" clearly refers to aviation, the purpose for which the field had been employed and that for which the Navy desired its retention.

The government calls our attention to the Act of August 29, 1916, 34 U. S. C. 522, which was replaced by the Act of August 5, 1947, 34 U. S. C. 522 (a), which it is claimed precluded the Secretary of Navy from entering into a lease other than one "revocable at any time." We have read these provisions and are not convinced that they support the government's contention. It passes all credulity that Congress would require that a lease be revocable at any time irrespective of the conditions existing or the reasons assigned therefor. More importantly, the record shows that the lease was prepared by the Secretary of Navy or his subordinates, and we think it safe to assume that

they were aware of their rights under the law and acted accordingly.

In view of the holding of the trial Court, which we have sustained, that the government was precluded from relying upon its notice of revocation, we see no point in discussing it. As we have already said, the revocation provision of the lease is now material only as it bears upon the extent of defendant's interest in the leasehold property and consequently the compensation to which it was entitled on its taking by the government.

We now come to the government's contention that the Court committed prejudicial error in its rulings on evidence relating to the value of defendant's leasehold interest. What we have heretofore said is dispositive to a considerable extent of the argument on this point. The general rule undoubtedly is that just compensation is to be determined by the fair cash market value of the property at the time of taking. The cases, however, recognize that this rule cannot be adhered to in situations where the property taken is unique. See *United States* v. *Two Acres of Land,* 144 F. 2d 207, *The City of Chicago* v. *Farwell et al.,* 286 Ill. 415, *The Sanitary District of Chicago* v. *Pittsburgh, Ft. Wayne and Chicago Ry. Co. et al.,* 216 Ill. 575, and *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312. Certainly the Court was presented with an extraordinary situation, in fact, we doubt if there is one in the books even closely akin to it. It would be difficult for any court to determine whether each bit of evidence introduced in such a complicated situation was proper. Our consideration of the points argued by the government leads us to the conclusion that the rulings of the trial Court on the admissibility of evidence were as accurate as could reasonably be expected under the circumstances. In any event, it is

our view that no prejudicial error was committed on this phase of the case.

Lastly, we come to the issue as to the authority or power of the trial Court to increase the verdict of the jury by way of additur. As already noted, the jury fixed the amount of just compensation at the sum of $25,000. The Court allowed additur in the amount of $50,000, and entered judgment for $75,000, together with interest from the date of taking. The government contends that the Court erred in allowing additur and in the allowance of interest on the increased amount of the judgment. As heretofore noted, additur was allowed in response to defendant's motion which prayed "that the Court substantially increase the jury's verdict by an additur and enter an amended judgment for the amount of such increased award consistent with the overwhelming evidence in this case, or in the alternative, grant the defendant a new trial." The additur was allowed without the consent of and over objection by the government.

As a basis for its action, the Court entered certain findings of fact, including the following:

> 1. The government adduced no evidence whatsoever regarding the value of the premises in question on the basis of the leasehold except on the theory that there was a cancellation of the lease which is contrary to the law and the facts.
>
> 2. The fair and just compensation for the premises in question is Seventy-five Thousand Dollars ($75,000.00).

While perhaps not relevant to the question for decision, we think it should be noted that finding 1 is not supported by the record. The testimony of government's witnesses on the issue of just compensation was not based on the theory that the lease had been cancelled but that its right to revoke was not limited to

Naval aviation purposes, in other words, consistent with the government's interpretation of the lease, that it had a right to revoke for purposes other than those of aviation.

We also note that defendant has filed a cross appeal "on the ground that said additur, in view of the evidence, is inadequate and should have been for an amount not less than $117,000.00 and should have resulted in a total judgment of not less than $142,000.00, together with interest from the date of taking of the property being condemned."

The government in support of its position relies upon *Dimick* v. *Schiedt*, 293 U. S. 474, in which it was held that additur violated the right to a jury trial guaranteed by the Seventh Amendment to the Constitution. That case involved an action for personal injury in which the jury returned a verdict in favor of plaintiff in the amount of $500. Plaintiff moved for a new trial, principally on the basis that the damages allowed were inadequate. The trial Court ordered a new trial unless defendant would consent to an increase of the damages to the sum of $1,500. Defendant consented to the increase, but without consent on the part of plaintiff the Court denied the latter's motion for a new trial and entered judgment for the increased amount. The Supreme Court held that the conditional order of the trial Court violated the Seventh Amendment of the Federal Constitution in respect of the right of trial by jury.

Defendant contends that the *Dimick* case is without application because there is no constitutional right to a jury trial in a condemnation proceeding. Such a distinction was drawn in *United States* v. *Kennesaw Mountain Battlefield Ass'n.*, 99 F. 2d 830. In this opinion of the Fifth Circuit, the allowance of additur in a condemnation proceeding was approved. This

being the only case of which we are aware which affords any support to the action of the Court in the instant matter, we think it deserves some detailed consideration. There, the Court increased the jury verdict of $9,000 to $16,000, by additur. Defendant filed a motion for a new trial and the Court directed that it be allowed unless the government filed its written consent to increase the compensation to $16,000. The government's written consent was given and the motion for a new trial denied. Both sides appealed. The Court of Appeals held, that the government could not complain of the allowance of additur because it had consented thereto. The condemnee, relying upon the *Dimick* case, contended that it had been denied the right to a trial by jury. The Court held that the parties in condemnation had no constitutional right to a jury trial, as was the situation in the *Dimick* case. The Court then stated (page 834):

> But if we are wrong in this, and the proceeding was a common law action with a jury trial guaranteed under the Seventh Amendment, still the judgment should be affirmed, because it conclusively appears from the record itself, and from the findings of the District Judge, that the trial was not attended with any error for which a new trial at common law ought to have been granted.

Thus, in *Kennesaw,* the condemnor, the party burdened by the allowance of additur, expressly consented thereto, while the condemnee opposed its allowance and urged its motion for a new trial.

In the instant case, the condemnor, the party burdened by the allowance of additur, objected thereto, while plaintiff requested a new trial only as an alternative to its motion for the allowance of additur. The facts of the two cases are similar in one respect, that

is, in both, the condemnee had no basis for a new trial other than that the amount of just compensation filed by a jury was inadequate. The Court of Appeals, in *Kennesaw* (page 833), agreed with the District Court that "the condemnor could not complain of the additur, because it had consented to it, the owner could not complain of it, because, there being no ground for a new trial, the addition to the verdict was in his favor."

We doubt if the Court in *Kennesaw,* absent consent on the part of the condemnor, would have approved additur. In both *Dimick* and *Kennesaw,* the complaining party was the one in whose favor additur had been allowed. In both cases the complaining parties refused to agree to additur but demanded a new trial. In *Dimick,* the Supreme Court ruled additur improper on the basis that the non-consenting party had a constitutional right to a jury trial. In *Kennesaw,* the Court held (1) that the non-consenting party had no constitutional right to a jury trial, and (2) that there was no error in the trial for which a new trial should have been granted.

We need not take issue with the holding in *Kennesaw* to reach the conclusion that it is without application in the instant situation. Here, additur was allowed at the request of defendant and over objection of the government. The theory of additur is a corollary to that of remittitur, the former to increase an inadequate verdict, the latter to decrease an excessive verdict. It is a universal rule, so far as we are aware—in fact, the parties in the instant action so agree—that a remittitur may not be granted by a court in lieu of a new trial unless consented to by the party "unfavorably affected thereby." Even though made in a different setting, we think a statement by the

Court in *Dimick* is pertinent. The Court stated (293 U. S. 474, 487):

> It is worthy of note that while for more than a century the federal courts have followed the approved practice of conditioning the allowance of a new trial on the consent of plaintiff to remit excessive damages, no federal court, so far as we can discover, has ever undertaken similarly to increase the damages, although there are numerous cases where motions for new trial have been made and granted on the ground that the verdict was inadequate.

We agree that parties to a condemnation suit have no constitutional guarantee of a jury trial but, even so, it does not follow that the Court, absent consent of the parties, has the authority to increase a jury verdict by additur or decrease it by remittitur. Rule 71 (A) (h) of the Federal Rules of Civil Procedure provides:

> * * * any party may have a trial by jury of the issue of just compensation by filing a demand therefor * * * unless the court in its discretion orders that because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it.

A jury trial was ordered in the instant case, the main and perhaps sole purpose of which was, as heretofore shown, to determine just compensation for the leasehold interest sought to be taken. The trial was conducted, so we think and hold, free from prejudicial error. We are not able to embrace any logical or reasonable theory by which the Court was authorized to substitute its judgment on the issue of just compensation for that of the jury, absent consent of the

parties. If Congress had intended that just compensation be determined by the Court, it could have easily so provided. If the Court has such authority, the right to a jury trial when awarded is little more than an empty gesture. The jury is stripped of the fact-finding characteristics inherent in the traditional jury trial and its function becomes nothing more than advisory.

It is our judgment, and we so hold, that the trial Court, under the circumstances, was without authority to increase the jury verdict by additur. It necessarily follows that there is no merit in defendant's cross-appeal. The judgment is reversed and the cause remanded, with directions that judgment be entered on the jury verdict in favor of defendant, together with interest thereon from the date of taking. This direction is without prejudice to the right of the Court to allow defendant's alternative motion for a new trial.

FINNEGAN, *Circuit Judge*: Dissenting. Since it is my view that this lease had been revoked, I am unable to agree with the majority opinion.

JUDGMENT

In the United States Court of Appeals for the Seventh Circuit

Chicago 10, Illinois

Tuesday, July 15, 1958

Before Hon. J. EARL MAJOR, *Circuit Judge;* Hon. PHILIP J. FINNEGAN, *Circuit Judge;* Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*

Nos. 12191, 12192

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT, APPELLEE

vs.

93.970 ACRES OF LAND, MORE OF LESS, SITUATE IN COOK COUNTY, STATE OF ILLINOIS, & ILLINOIS AIRCRAFT SERVICES & SALES CO., INC., DEFENDANTS-APPFLLEES, APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, AND THAT THIS CAUSE BE, AND IT IS HEREBY, REMANDED TO THE SAID DISTRICT COURT IN ACCORDANCE WITH THE OPINION OF THIS COURT

FILED THIS DAY, WITH DIRECTIONS THAT JUDGMENT BE ENTERED ON THE JURY VERDICT IN FAVOR OF DEFENDANT, TOGETHER WITH INTEREST THEREON FROM THE DATE OF TAKING. THAT DIRECTION IS WITHOUT PREJUDICE TO THE RIGHT OF THE COURT TO ALLOW DEFENDANT'S ALTERNATIVE MOTION FOR A NEW TRIAL.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 573

UNITED STATES OF AMERICA,

Petitioner,

v.

93.970 ACRES OF LAND, MORE OR LESS, IN COOK COUNTY, ILLINOIS, AND ILLINOIS AIRCRAFT SERVICES AND SALES COMPANY, INCORPORATED,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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BRIEF IN OPPOSITION.

QUESTIONS PRESENTED.

With respect to the first question which the Government has presented (concerning election of remedies), it will hereinafter be demonstrated that the question is not actually in the case. This question was decided by the Court of Appeals by way of *dictum* since the Court proceeded to construe the lease and determine the rights of the parties under the lease in connection with the valuation issues.

With respect to the second question presented by Government, many important elements have been omitted; for example, a reference to the recital in the preamble of the lease which reads:

"because of its strategic value, it is considered essential that the said airfield and the facilities thereon * * * be retained in a stand-by status for post-war use in connection with Naval Aviation activities, * * *";

other provisions in the lease; actions of the parties construing the lease, including expenditure of $60,000 for permanent improvements by lessee with approval of lessor.

REASONS FOR DENYING THE WRIT.

1. Election of Remedies.

a. In the trial court and in the Court of Appeals respondent urged that by instituting condemnation proceedings the Government was estopped by the doctrine of election of remedies from asserting: (1) that it had revoked the respondent's lease; and (2) that by reason thereof respondent had no interest in the property. This position was sustained by the courts below. However, the trial court and the Court of Appeals found it necessary to construe the lease for the purpose of determining the value of the lease and the amount of just compensation to be awarded.

These courts believed that the issue of the right of Government to revoke the lease was unavoidable on the question of just compensation because revocability was one of the elements of value. Accordingly, they applied the doctrine of election of remedies, which should have barred any inquiry into the issue of whether or not the Government had the right to revoke, in a manner which made the doctrine actually unnecessary and meaningless because the issue of revocability immediately cropped up

in connection with valuation. Even though the Court of Appeals below had in mind the valuation issue when it construed the lease, the end result was a determination that Government could not revoke the lease for the purpose stated in the notice of revocation, and this determination was made on the basis of contract law and not on the basis of the doctrine of election of remedies. The Court thus did entertain the issue of revocation of the lease raised by Government and actually adjudicated it. The Government has had a full hearing and determination of the issue of revocation which it now claims it has been precluded from raising. It is respectfully suggested that this Court should not grant certiorari to review the election of remedies issue which was actually decided only academically by the court below without any effect on its ultimate decision.

As to the merits of invoking the doctrine of election of remedies, its application to condemnation cases is sound. With respect to the inconvenience that the Government claims will flow from the application of the doctrine of election of remedies, the Government is resorting to the familiar cry of expediency which has throughout the history of Government been seized upon in an effort to whittle away personal and property rights. Government claims that it would be inconvenient to seek to obtain through a possessory action possession of property which it claims by right of ownership. It prefers to seize possession first by exercising its sovereign powers of eminent domain and then at its leisure, litigate the question of whether it is entitled to possession by virtue of ownership. Possessory actions are summary in nature and it must be presumed that the trial courts would always be responsive

to the urgencies of the situation and would grant the Government a speedy trial if the Government would bring any possessory action to test its rights to the property. There is no genuine necessity for obliterating the property right to remain in possession until there has been an adjudication that an adversary claimant is entitled to that possession.

b. The effort of the Government to criticize the situation as a matter of form and technical pleading discloses a complete misunderstanding of the situation. There are fundamental rights involved. When a contest over the right of possession is instituted, the person in possession cannot be ousted from possession until the rights of the parties have been adjudicated. Even the Government in a possessory action would not have the right to be put in possession until it has established that right after trial. The Government's position as claimed owner with right of possession is far different from the Government exercising the power of eminent domain. The exercise of the latter power entitles it to immediate possession leaving only the question of amount of compensation it is to pay for the property taken. It is not merely a difference in form when the Government files an action claiming to exercise the power of eminent domain as contrasted with a pleading asserting ownership and right of possession. As the Court of Appeals below said: "In the same breath, the Government proclaimed and denied defendant's ownership of the leasehold estate. Such an absurd position is not countenanced by law, as we understand it, and neither is it supported by logic, reason or common sense." It is highly inequitable to permit the Government to reap the benefits (immediate possession) of the exercise of eminent domain and then abandon its sovereign cloak and pursue the course of an ordinary litigant claiming property as a matter of right.

The exercise of the sovereign power of eminent domain is at best harsh in its consequences because it takes property from the owner without his consent. One of the harshest incidents of the situation is virtually instantaneous surrender of possession. The harshness of the situation should not be aggravated by distorting the power of eminent domain to permit the Government to seize possession immediately in connection with the non-sovereign claim of ownership and possession.

c. The Government's assertion that the decision below is in square conflict with the decision of the Court of Appeals for the Fifth Circuit in *United States* v. *Turner*, 175 F. 2d 644, is based upon a misapprehension of the law applicable to election of remedies. The court below was bound under Federal statutes to apply the law of the State of Illinois. By virtue of Federal statutes (50 U.S.C. 171; 10 U.S.C. 2663), local law is applicable to Federal condemnation cases. The laws of the forty-nine states might differ and the various Courts of Appeal might reach varying conclusions on the question of election of remedies. This would not necessarily create a conflict in the decisions. The various Courts of Appeal would simply be applying the law of the particular state in which the condemned property is located. While it is not clear from *United States* v. *Turner* which law was being applied, it is obvious that it could not have been the law of Illinois, since the land being condemned was situated in Alabama.

d. The complaint in the instant case relies for the taking upon 50 U.S.C. 171, among other statutes. This Act provided that proceedings thereunder should be "in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted". 50 U.S.C. 171 was repealed and replaced on August 10, 1956 by the Armed Forces

Recodification Statute, 10 U.S.C. 2663, which provides that the condemnation proceedings "shall be in accordance with the law of the state in which the suit is brought".

The decision of the Court of Appeals below on the question of election of remedies is supported by settled Illinois law, which is the only law applicable. Therefore it is specious for the Government to argue that a conflict of decisions results from holdings of courts necessarily decided on the basis of the law of other states or Puerto Rico.

If this state of lack of uniformity in result, because of differences in local law, inflicts a hardship upon Government in its condemnation activities, which is not persuasively demonstrated, the remedy, we respectfully submit, is not in a review of this decision by this Court but in an appeal to Congress to amend the Federal law on the subject. The Government has not shown any conflict of decisions on the election of remedies issue which warrants granting certiorari on this question.

2. Construction of the Lease and the Leasing Statute.

The legal issues in the case at bar pertaining to the construction of the lease and of the statute under which it was executed are not of general importance. In fact, it is safe to say that the decision in this case should be of interest to practically no one except the parties in view of the unique language of the lease, the unique nature of the demised premises and the uses made thereof during the term of the lease, and the combination of unusual circumstances involving the parties' own construction of the lease by their conduct during respondent's seven and one-half years of possession of the premises. The possibility of a similar factual situation ever again arising

whether based on existing or future government leases, passes all credulity.

The Court of Appeals below, in commenting upon the evidence, stated:

> "Certainly the Court was presented with an extraordinary situation; *in fact, we doubt if there is one in the books even closely akin to it.* It would be difficult for any court to determine whether each bit of evidence introduced in such a complicated situation was proper." (Emphasis added.)

While the case at bar lacks national importance because of its uniqueness, the complicated evidence necessarily involved in proving the fair market value of the condemned leasehold apparently has confused the Government into believing that the case presents novel legal issues pertaining to leases and statutory construction. Actually, the legal issues involve only elementary and simple principles of contract and statutory construction which have been overwhelmingly adjudicated in favor of respondent's position by numerous precedents.

The confusion on this score on the part of the Government is demonstrated by its statement of question 2 appearing on page 2 of its Petition for a Writ of Certiorari; namely,

> "Whether a lease of a Navy airfield which provided that it could be revoked upon a determination that 'such revocation is essential' and which was entered into under a statute requiring that such leases be revocable 'at any time', could be revoked upon a determination that the property was needed for an Army missile site."

By quoting out of context selected phrases of the lease and the statute, the Government has evolved a question

of law which on its face is self-answering but which in reality has no resemblance to the true issues involved. Actually, the lease was not revocable upon a determination that such revocation is essential. Nor does the statute require that such leases be unconditionally revocable at any time.

It is an elementary principle of law that a lease, as any contract, must be construed as a whole and the intention of the parties collected from the entire instrument and not from detached portions, it being necessary to construe all its parts in order to determine the meaning of any particular part as well as the whole. Likewise, it is a fundamental principle of construction that the conduct of the parties, especially during performance of the contract, indicating their construction of the lease, must be considered.

It is perfectly apparent from its opinion that the Court of Appeals reached its conclusion that the lease could be cancelled only for aviation purposes, contrary to the Government's contention that it could be cancelled for any reason whatsoever, by following the foregoing elementary principles of construction.

This involved an exhaustive review of the terms of the lease and the complicated evidence to reach a conclusion regarding the intention of the parties with regard to the meaning of the cancellation clause. But no novel legal issues were involved in this process; nor are any now involved.

Likewise, as the Court of Appeals below points out, "There is no question but that the lease conferred upon the government the power of revocation. The controversy concerns the manner, purpose and by whom such power may be exercised." And subsequently in its opinion the

Court also states, "It passes all credulity that Congress would require that a lease be revocable at any time irrespective of the conditions existing or the reasons assigned therefor. More importantly, the record shows that the lease was prepared by the Secretary of the Navy or his subordinates, and we think it safe to assume that they were aware of their rights under the law and acted accordingly."

Because the lease could be revoked at any time during a National Emergency it fully complied with the statute, and merely because it could be revoked only for the reasons stated in the lease no novel question of law is involved. This is true of every lease.

We shall not burden the Court with extended argument on the question of the construction of the lease because the decision below fully explains the basis upon which the court reached its conclusion; that the absolute power of revocability by Government does not exist. The lease in the case at bar is unlike the lease in the case referred to in the footnote on Page 25 of the Government's Petition (*Hingham Management Corp.* v. *United States*). In that case the lease provided that it could be terminated "at any time * * * during any national emergency." The lease in the case at bar in its revocation clause is not similarly absolute and all-embracive. It provides not only for the existence of a national emergency but injects the additional reqpirement of "a decision by the Secretary of the Navy that such revocation is essential". The element of essentiality is subject to different constructions and accordingly, it becomes necessary, in order to ascertain what the parties meant by the word "essential," to resort to other provisions in the lease and the conduct of the parties construing the lease. For example, the record shows that the lessor authorized the lessee to

expend $60,000.00 of lessee's own money for permanen improvements, and that such improvements were actuall made to the demised premises. This is inconsistent wit the precarious tenancy which the government claims wa granted by the lease. It was consistent only with a rea sonable, calculated risk that termination could take plac only if the premises were again needed for Naval Avia tion purposes, an eventuality that never occurred; an which the evidence showed was extremely remote.

The preamble in the lease makes it clear that the in tention of the parties was to preserve the demised prem ises as a stand-by airfield "for post-war use in connectio with Naval Aviation activities", and that the parties in tended that the lease could be revoked only if the Secre tary of the Navy considered that the demised premise were essential for Naval Aviation activities.

With respect to the supposed repugnance between th revocability clause as interpreted by the court below an the applicable Federal statutes, it should be remembere that this lease was drawn by Government attorneys an signed by Government officials. It is to be presumed tha they were correctly interpreting their powers under th Federal statutes. The language of the revocation claus did not stop at expressing absolute power to revoke. attached an important qualification.

It is not unreasonable to construe the statute as pe mitting revocation only in the limited circumstances de fined by the revocation clause in the lease. The object o the statute was to insure that the leasing authority coul recapture the property *for the use to which it was bein preserved in a stand-by condition.* This is an intelligen interpretation of the statute. With respect to the demise premises in the case at bar, the intention of the statut

and the intention of the parties are both effectuated because the Secretary of the Navy reserved the right under the lease to repossess himself of the property whenever it was needed *for Naval Aviation activities.* If a broader power of revocation was desired, it would have been easy to insert a provision to that effect. The Government attempts to argue the point as though the revocation clause contained such an omitted provision.

CONCLUSION.

For the foregoing reasons, the Government's petition for writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 573

UNITED STATES OF AMERICA, PETITIONER

v.

93.970 ACRES OF LAND, MORE OR LESS, IN COOK COUNTY, ILLINOIS, AND ILLINOIS AIRCRAFT SERVICES AND SALES COMPANY, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court did not write an opinion. The opinion of the court of appeals (R. 460–479) is reported at 258 F. 2d 17.

JURISDICTION

The judgment of the court of appeals (R. 480) was entered July 15, 1958. On October 4, 1958, an order was entered by Mr. Justice Clark extending the time for filing a petition for a writ of certiorari to and including December 12, 1958. The petition was filed on December 11, 1958, and was granted on January 26, 1959 (R. 481). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in an action to condemn "any" interest remaining in a lessee of Government property, the Government is estopped to assert that the lessee has no interest in the property because the lease was revoked.

2. Whether a lease of a Navy airfield which provided that it could be revoked upon a determination that "such revocation is essential," and which was entered into under a statute requiring that such leases be revocable "at any time," could be revoked upon a determination that the property was needed for an Army missile site.

STATUTES INVOLVED

The Act of August 29, 1916, 39 Stat. 556, 559, 34 U.S.C. (1946 ed.) 522, provided in part:

> LEASE OF NAVAL LANDS: That authority be, and is hereby, given to the Secretary of the Navy, when in his discretion it will be for the public good, to lease for periods not exceeding five years and revocable at any time, such property of the United States under his control as may not for the time being be required for public use and for the leasing of which there is no authority under existing law, and such leases shall be reported annually to Congress: * * *.

The Act of August 5, 1947, § 1, 61 Stat. 774, 34 U.S.C. 522a, provides in part:

> That whenever the Secretary of War or the Secretary of the Navy shall deem it to be advantageous to the Government he is author-

ized to lease such real or personal property under the control of his Department as is not surplus to the needs of the Department within the meaning of the Act of October 3, 1944 (58 Stat. 765), and is not for the time required for public use, to such lessee or lessees and upon such terms and conditions as in his judgment will promote the national defense or will be in the public interest. Each such lease shall be for a period not exceeding five years unless the Secretary of the Department concerned shall determine that a longer period will promote the national defense or will be in the public interest. The Secretary of the Department concerned may include, among other terms and conditions in the lease, a right of first refusal in the lessee to purchase the property in the event of the revocation of the lease in order to permit sale thereof by the Government, but this section shall not be construed as authorizing the sale of any property unless the sale thereof is otherwise authorized by law. Each such lease shall contain a provision permitting the Secretary of the Department concerned to revoke the lease at any time, unless the Secretary shall determine that the omission of such provision from the lease will promote the national defense or will be in the public interest. In any event each such lease shall be revocable by the Secretary of the Department concerned during a national emergency declared by the President. * * *

STATEMENT

On October 6, 1954, the Government filed a complaint in the United States District Court for the

Northern District of Illinois seeking to acquire by condemnation any outstanding interests in the United States Naval Outlying Airfield, located near Chicago (R. 9–12). Respondent, which was operating the property as an airport, claimed that it held the property under a lease from the Government and that it was entitled to compensation for the taking of its leasehold interest. The Government claimed that the lease had been revoked and denied that respondent had any interest in the property. Both the district court and the court of appeals upheld respondent's claim. The relevant facts are as follows:

On May 2, 1947, the United States and respondent executed a lease of the airfield providing in part as follows (R. 12–23):

* * * * *

> Whereas, because of its strategic value, it is considered essential that the said airfield and the facilities thereon, comprising the said United States Naval Outlying Airfield, be retained in a stand-by status for post-war use in connection with Naval Aviation activities; and
>
> * * * * *
>
> Whereas, the use of the airfield and facilities by the Lessee for such purposes will in no wise be detrimental to the present activities of the Navy Department, but is on the contrary deemed to be in the best interest of the Government.
>
> Now Therefore, in consideration of the foregoing, and of the covenants and agreements hereinafter mentioned, the Government * * * [hereby leases the airfield to Lessee, for use as an airport, for a five-year term ending May

1, 1952], unless sooner terminated as hereinafter provided and subject to the following conditions and covenants:

1. This lease may be terminated by the Government as hereinafter provided. Further, this lease may be terminated by the Lessee at any time after presentation of a written notice to the Government not less than sixty (60) days prior to its intention to so terminate. It is agreed that the term of this lease may be renewed by the Lessee for an additional period of five years upon the same terms and conditions as set forth herein provided that in the opinion of the Secretary of the Navy the premises are not essential for governmental purposes only.

* * * * *

14. It is understood and agreed that this lease will at all times be revocable at will by the Government upon presentation of notice of cancellation to the Lessee, in writing, sixty (60) days prior to such termination, in the event of default with regard to the covenants and conditions of the lease or in event of a national emergency and a decision by the Secretary of the Navy that such revocation is essential.

* * * * *

The lease was extended under paragraph 1 for an additional five-year term, to run until May 1, 1957 (R. 24).

In April 1954, jurisdiction over the property was transferred from the Department of the Navy to the Department of the Army (R. 11, 436), which needed the property for use as an aerial defense missile (NIKE) site (R. 46). Respondent was notified of

the transfer and tendered rental to the new agency designated (R. 28, 29). On July 27, 1954, a notice of revocation of the lease under paragraph 14, signed by both the Secretary of the Army and the Secretary of the Navy, was delivered to respondent (R. 11, 23–25). The notice recited that a state of national emergency had been declared by the President on December 16, 1950, that possession of the property "is required for military purposes," and that both Secretaries had determined that "revocation of the said lease is essential." The notice stated that the lease "is hereby revoked, effective September 27, 1954", and demanded that respondent vacate the premises by that date (R. 23–25).

Respondent refused to surrender possession of the property, claiming that the lease could be revoked only for the purpose of using the property for "Naval Aviation activities," within the meaning of the preamble of the lease, and could not be revoked in order to use the property for an Army missile site.[1]

To obtain immediate possession, the Government, on October 6, 1954, instituted this condemnation action. The complaint (R. 9–12), to which a copy of the lease and of the notice of revocation was appended (R. 12, 23), recited that the lease had been revoked but that respondent refused to vacate the property and was "claiming an interest" therein. The complaint sought

[1] On August 10, 1954, respondent filed a complaint against the United States and the Secretaries of the Army and the Navy, seeking a declaratory judgment that the revocation was ineffective for that reason, but the complaint was voluntarily withdrawn on August 23, 1954, after the Government had asserted a lack of jurisdiction over the parties.

to acquire by condemnation "any possessory rights" in the property and, in particular, "all remaining outstanding right, title and interest, if any, of" respondent. The prayer was that the property be condemned, that an order be entered granting the Government immediate possession, and that "just compensation, if any" be determined and awarded. An order granting the United States possession of most of the property was entered on the same day (R. 26–27, 39). Construction of the project commenced within a few days.

Respondent answered the complaint, seeking just compensation for the remaining term of the lease (about 2 years and 8 months) (R. 27). By motions to strike respondent's answer and for summary judgment, the Government asserted that the lease had been revoked and that respondent therefore had no interest in the property. Both motions were denied and the case was set for a jury trial on the issue of valuation (R. 38–42). At the trial the court ruled that the Government, having elected to condemn respondent's leasehold interest, could not assert that the lease had been terminated, and that the only issue to be tried was the valuation of the remaining term of the lease (R. 49–50, 67–68, 73, 93–94).

At the close of the trial, the Government moved for a directed verdict of no compensation, but the motion was denied (R. 386). The court (over timely objections) instructed the jury that the lease had not been canceled and was still in effect at the date of the taking; that in determining the value of the remain-

ing term of the lease the jury could take into account the fact that it was subject to future revocation under paragraph 14 but that it could be so revoked only upon a determination that revocation was "essential for aviation purposes"; and that the use of the property as a NIKE site was not an "aviation use" within the meaning of the lease (R. 421–422).

The jury returned a verdict finding just compensation for respondent's leasehold to be $25,000, and judgment was entered accordingly (R. 442). The Government's motion for judgment notwithstanding the verdict was denied (R. 443–444). Respondent's motion for additur or, in the alternative, for a new trial on the ground of insufficiency of the verdict was granted, and, upon supplemental findings by the court that respondent was entitled to an additur of $50,000, an amended judgment was entered awarding respondent $75,000, plus interest from the date of taking (R. 446–448).

On appeals taken by both parties, the court of appeals held that the district court was without authority to allow additur and remanded the case with directions either to enter judgment on the jury's verdict or to grant the alternative motion for a new trial. On all other issues, the court, by a divided vote, affirmed the district court (R. 460–475). It held that the Government had "elected" to condemn respondent's leasehold interest rather than pursue its remedies to obtain possession under the revocation and that the Government's reliance on the revocation "was entirely inconsistent with its condemnation complaint," since "In the same breath, the Government

proclaimed and denied defendant's ownership of the leasehold estate" (R. 472). The court accordingly refused to determine whether the revocation notice of July 27, 1954, had been effective to terminate the lease.

On the question of the effect of paragraph 14 on the value of the remaining term of the lease, the court held that that paragraph should be read in the light of the preamble and that, so read, the requirement in paragraph 14 of a determination that "revocation is essential" required a determination that it was essential "for aviation purposes." The court also rejected the argument that the authorizing statute required such leases to be revocable at any time, stating that it was "not convinced" that the statute supported the contention; that it "passes all credulity" that Congress so intended; and that it could be assumed that the Government acted in accordance with the statute when it prepared the lease (R. 473–474). In view of its first holding that the prior revocation was irrelevant, the court did not reach the Government's alternative contention that use of the property for a missile site ("aircraft" of a sort) was a proper reason for revocation even under the court's construction of the lease (R. 475).

SUMMARY OF ARGUMENT

I

A. The Government, needing (for use as a missile base) property previously leased to respondent, revoked respondent's lease, but respondent, claiming the revocation was invalid, refused to give up possession. To obtain immediate possession, the Government then filed a complaint in a condemnation

proceeding, alleging that respondent had no interest in the property but seeking to acquire for the Government whatever interest respondent still possessed. The courts below held that the Government was estopped to deny respondent's title and was required to pay it just compensation for the value of the remainder of the lease term regardless of the validity of the prior revocation. The question is whether the Government may assert in a single proceeding both its existing rights to property and its right to condemn any interests found to be outstanding.

B. The question is governed by federal law. The provision of the military purposes condemnation statute (50 U.S.C. 171) requiring conformity with state procedure was superseded in 1951 by Rule 71A of the Federal Rules of Civil Procedure. The reenactment of the conformity provision in the 1956 codification of military laws into Title 10 was obviously inadvertent. The codification was not intended to effect any substantive change, and could not in any event alter the effect of the complaint filed in this action in 1954. The conformity provision, moreover, was retroactively deleted from Title 10 by the Act of September 2, 1958, 72 Stat. 1437.

C. The decision below, requiring the Government first to litigate its existing claims to the property in independent proceedings and only then to condemn any interests outstanding, necessarily postponing its taking of possession in the meantime, would unduly hamper urgent programs requiring acquisition of property to which the Government asserts an existing right. In

addition, the resulting multiplicity of actions would impose unnecessary burdens both on the courts and the parties and would be inconsistent with the purposes of the Federal Rules. Since the Government will be entitled to possession (either by taking or by right), whatever the outcome of the respondent's claim, there is no practical obstacle to giving it immediate possession and resolving the question of respondent's interest in determining compensation. Such a procedure works no hardship on the condemnee, and neither the court below nor respondent has suggested any reason to require two proceedings instead of one.

The Government's claim simply put in issue the right to the property on the date of taking, and that issue is implicit in all condemnation proceedings. When the dispute over title is between private claimants to the property, it must admittedly be resolved by the condemnation court in awarding compensation, and the principle is no different when the dispute is between the Government and a private claimant: in either event, each claimant must prove his right or title in order to be entitled to compensation.

Of the cases involving title disputes between the Government and a condemnee, we know of none, not based on local procedure, which has ever denied the right of the Government to have its claims determined in the condemnation action, and the cases expressly discussing the question are squarely opposed to the decision below. *United States* v. *Turner*, 175 F. 2d 644 (C.A. 5); *United States* v. *San Geronimo Development Co.*, 154 F. 2d 78 (C.A. 1), certiorari denied, 329 U.S. 718.

The decision below is also inconsistent in underlying principle with the many cases recognizing the propriety of using condemnation, not to acquire an identified interest or to determine compensation, but simply to perfect a title acquired by a contract of purchase. *E.g., Danforth* v. *United States,* 308 U.S. 271.

II

The lease of the property, a former naval airfield, provided that it was "revocable at will" upon a determination by the Secretary "that such revocation is essential." The court of appeals held that the lease could be revoked only if the property were "essential for aviation purposes", which the district court held did not include use of the property as an army missile base. The sole basis for that interpretation was a "Whereas" clause in the preamble of the lease reciting that it was necessary to retain the property in "a stand-by status for post-war use in connection with Naval Aviation activities."

That interpretation of the lease is unsound. The "Whereas" clause was a recital of the justification for the Navy Department's keeping the property and leasing it rather than declaring it surplus and disposing of it; it was in no way related to the scope of the revocation clause. The revocation clause itself is unqualified and gave the Government the right to revoke for any governmental purpose.

The statute authorizing the lease, moreover, expressly requires that such leases be revocable "at any time." There is no basis for construing the statute as

conferring less than an absolute and unconditional right of revocation. Clearly, therefore, the revocation of the lease for the purpose of using the property for a missile base was valid, and respondent had no interest in the property at the date of the condemnation.

ARGUMENT

I

THE GOVERNMENT MAY PROPERLY ASSERT IN A SINGLE PROCEEDING BOTH ITS EXISTING RIGHTS TO PROPERTY AND ITS RIGHT TO CONDEMN ANY INTERESTS FOUND TO BE OUTSTANDING

A. INTRODUCTION

The Government needed property it had previously leased to respondent for use as a NIKE missile site. To obtain possession, it revoked the lease, claiming the right to do so under its terms and the authorizing statute. Respondent contended that the revocation was ineffective and refused to surrender possession. The validity of the revocation could have been determined by an action in ejectment or to quiet title, but the Government could not delay construction of the NIKE site for the months or years required to conclude such an action. Moreover, it was willing to take the property by eminent domain if it was not otherwise entitled to it. To obtain immediate possession, therefore, the Government filed a complaint and a motion for possession in a condemnation proceeding. The complaint, although alleging that the lease had been validly revoked (and hence that respondent had no remaining interest in the property), nevertheless sought to acquire whatever interest respondent might be found still to possess.

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The court below held that, by initiating a condemnation proceeding, the Government had foreclosed itself from asserting its rights under the revocation, and hence that respondent must be deemed entitled to compensation for the taking of the leasehold interest. In the court's view, the Government, if it wished to preserve its rights under the revocation, was required first to proceed by an independent action, such as ejectment, to obtain possession on that ground and only then, if that action was unsuccessful, initiate condemnation proceedings. Assuming that the revocation was valid, the court's holding in effect gave the Government the choice of either (*a*) paying for what already belonged to it or (*b*) postponing its taking of possession (and the installation of the NIKE site) until its ownership was established in independent proceedings.[2]

Such a bar to the Government's asserting in a single proceeding both its existing rights to property and its right to take any interests found to be outstanding would seriously hamper important governmental programs. Urgent projects requiring the acquisition of land to which the Government asserts

[2] We do not understand the suggestion of the court below (R. 471) that the Government might have obtained immediate possession by an action of ejectment, with the respondent then suing for compensation in the Court of Claims. In ejectment, possession could not have been obtained until after litigation of the merits, and if possession were so obtained there would be no basis for a suit in the Court of Claims. Apparently the court was referring to the Government's argument that it might have simply *seized* the property, under its powers of eminent domain, without benefit of judicial procedure. See *United States* v. *Dow*, 357 U.S. 17. If so, it may be that the decision leaves it open to the Government to follow that pro-

an existing interest would have to be delayed while that right is being litigated in independent proceedings. As this Court has said in a similar context, "Such a construction would be intolerable. The march of public improvement cannot thus be stayed by uncertainties, complications or disputes regarding the title to property sought to be condemned * * *." *United States* v. *Dunnington*, 146 U.S. 338, 350. The multiplicity of suits required under the decision below would, in addition, unnecessarily burden the courts and cause delay, inconvenience, and added expense to those claiming interests against the Government—who, like the Government, would be forced to protect their interests in two separate proceedings.

We shall show below (*infra*, pp. 19–30) that there is no reason—whether of policy, of logic, or of authority—for requiring such cumbersome procedures to be followed. There is, however, a preliminary question to be disposed of, *i.e.*, whether the issue is one of federal or of state law.

B. THE ISSUE IS ONE OF FEDERAL LAW

In the court of appeals and in its brief in opposition here, respondent contended that the question in

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cedure and then to assert its existing right to the property as a defense in the suit for just compensation—though it is not clear why the exercise of the power of eminent domain in that manner would be any less an "election", under the theory of the court below, than its exercise by judicial proceedings. In any event, clearly no purpose would be served by forcing the Government, in such cases, to abandon the orderly judicial procedure established by Congress, with its numerous protections for the condemnee, in favor of the seizure method, leaving the property-claimant to a suit in the Court of Claims for his sole remedy.

this case was governed by state law under 50 U.S.C. (1952 ed.) 171. That section, dating from 1890 (26 Stat. 316), authorized the Secretary of the Army to institute condemnation proceedings to acquire property for military use and provided that "such proceedings [are] to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted." That "conformity" provision has, however, been superseded by the Federal Rules of Civil Procedure.

1. Prior to the Federal Rules, of course, all civil actions in the federal courts were required to conform to local procedure under the general conformity statute. Consistently with that philosophy, the numerous condemnation statutes, including 50 U.S.C. 171, likewise required conformity with state procedure. When the Federal Rules were adopted in 1938 to provide a uniform federal procedure in all civil actions, no agreement was reached on the procedure to be followed in condemnation cases and, accordingly, condemnation proceedings were expressly excepted from the Rules by Rule 81(a)(7), which provided: "In proceedings for condemnation of property under the power of eminent domain, these rules govern appeals but are not otherwise applicable." In 1951, however, after several prior attempts to formulate a rule governing condemnation proceedings—the history of which is recited in the report of the Advisory

Committee[3]—Rule 81(a)(7) was deleted and Rule 71A, making the Federal Rules applicable to condemnation proceedings and prescribing the procedure to be followed in such cases, was adopted. 341 U.S. 962.

Rule 71A(a), as thus adopted and as in force when this proceeding was instituted, provides:

> The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

That the very purpose of that Rule was to provide a uniform federal procedure in condemnation cases in lieu of the diversity of state procedures required to be followed under the old conformity provisions is obvious, and the Advisor's notes, indeed, list 50 U.S.C. 171 among the statutes which occasioned the need for the Rule.[4] And since 28 U.S.C. 2072, in authorizing the Federal Rules, provides that "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect," there can be no contention that Rule 71A was not effective to supersede the conformity provisions of the several condemnation statutes. Matters affecting the Government's substantive rights have always been

[3] H. Doc. 121, 82d Cong., 1st Sess., Appendix, pp. 18–20; 28 U.S.C. (1952 ed.), p. 4358.

[4] H. Doc. No. 121, 82d Cong., 1st Sess., Appendix, p. 21; 28 U.S.C. (1952 ed.), p. 4359. See also H. Doc. No. 121, Appendix, *supra*, at 25–26 (28 U.S.C. at p. 4360), noting that Rule 71A was not intended to supersede the substantive provisions of the various condemnation statutes, specifically including 50 U.S.C. 171, which "authorize the acquisition of title or the taking of immediate possession."

governed by federal law. *United States* v. *Miller*, 317 U.S. 369; *United States* v. *Certain Parcels of Land in Philadelphia*, 144 F. 2d 626 (C.A. 3). With the addition of Rule 71A, therefore, the supremacy of federal law was made complete, so that in federal condemnation proceedings all questions, whether of substance or of procedure, relating to the exercise of the federal power of eminent domain (as distinguished from questions of local property law, etc.), are now governed exclusively by federal law.[8]

2. Respondent's contrary contention is based primarily upon the 1956 re-enactment of the provisions of 50 U.S.C. 171, with minor word changes, as 10 U.S.C. (Supp. V) 2663, as part of the codification into a single title of the previously scattered laws governing the armed forces. The short and complete answer is that, even if Rule 71A had to that extent been superseded in 1956, it was nevertheless governing when the complaint in this case was filed in 1954—the only time when the Government may be charged with having made a choice of alternatives. It is clear, however, that the rephrasing and codification into one title of the numerous statutes replaced by Title 10 was not intended to effect any substantive change. Section 49(a) of the codifying statute expressly stated that "it is the legislative purpose to restate, without substantive change, the law replaced

[8] In our view, the issue in this case—whether the Government can, by condemnation, obtain immediate possession of property which it claims to own without sacrificing its claims of ownership—affects such substantial rights of the Government as to be a matter of "substance" which would have been governed by federal law even under the old conformity statutes.

by" Title 10.* Act of August 10, 1956, 70A Stat. 1, 640. Such a formal revision and recodification of existing statutes has no substantive effect. *E.g., Fourco Glass Co.* v. *Transmirra Corp.*, 353 U.S. 222, 227.

In any event, whatever the merits of the dispute when the case was before the court of appeals, the issue has now been resolved by Congress. By the Act of September 2, 1958, Congress retroactively amended 10 U.S.C. 2663 by deleting the conformity provision.. §§ 33(a)(14), 33(g), 72 Stat. 1437, 1565, 1568. The reasons given for the amendment were an express recognition that the conformity provisions of the old condemnation statutes had been superseded by Rule 71A and that the failure to omit that part of 50 U.S.C. 171 during its recodification was an oversight (S. Rep. 2095, 85th Cong., 2d Sess., p. 110):

> The deletion of the last sentence of section 2663(a) and the last sentence of section 2664 (a) reflects their implied repeal by Rule 71A of the Rules of Civil Procedure for the United States District Courts (see 28 U.S.C. 2072).

C. THE DECISION BELOW IS ERRONEOUS

The issue in this case is whether a court in a condemnation proceeding may determine to whom the

*See also S. Rep. 2484, 84th Cong., 2d Sess., pp. 15, 19; 102 Cong. Rec. 4121 (Notice of Hearings); 102 Cong. Rec. 13944 (Senator O'Mahoney, manager of the bill: "I wish it clearly understood that no change of substantive law is included in this measure. * * * it is simply a restatement of existing law"); 102 Cong. Rec. 13952 (Senator Wiley: "The committee * * * concluded that * * * [the bill] accurately reflects the presently existing military law, and that there is no reason to fear that any substantive change has been made.").

property taken belongs. The question of "election of remedies" elaborated by the court of appeals is a spurious issue. The notion underlying the decision below is the thought that it is somehow "repugnant" to reason for the Government to assert that it owns the property but, if not, that it is willing to pay for it. We shall show not only that the Government's alternative pleading was conceptually manageable but that it afforded an entirely appropriate procedure for the resolution of the dispute between the parties and posed no issues not traditionally involved in condemnation proceedings.

1. There is no reason in logic or as a matter of sound procedure why both the Government's existing rights to the property and its right to condemn any interest found still to exist in respondent should not be asserted in a single proceeding. Since the Government asserted not only its present ownership of the property, but also its right to take any interests that might be found to be outstanding, it was entitled to immediate possession, whatever the outcome of its full ownership claim. There was therefore no obstacle to granting immediate possession and reserving the questions of ownership for resolution in determining what, if any, compensation was owing to respondent.

In contrast to the obvious advantages of the procedure followed, the opinion of the court of appeals offers no reason, apart from the court's conceptual difficulties, for requiring two proceedings instead of one. Respondent, in its brief in opposition, suggests that

it is prejudiced by the procedure in that it is deprived of its "right" to remain in possession pending the final adjudication of an ejectment action (Br. Op., p. 4). But if respondent's claimed interest in the property is ultimately upheld in this action, the award of just compensation will, by definition, fully compensate it for its loss of possession. If it is held not to have had an interest, and hence is not awarded compensation, then by definition it had no "right" to possession of which it was deprived.

Lacking any justification in terms of policy or otherwise, the decision below can be explained only as a return to pleading concepts long ago rejected by the Federal Rules. Cf. *Conley* v. *Gibson,* 355 U.S. 41, 48. In substance, the court holds simply that there is no "form of action" (R. 471) in which the Government's right to employ condemnation to obtain immediate possession (subject to payment of just compensation for any interests owned by others) can be enforced while preserving its own rights of ownership. The complete answer, we submit, lies in Rule 2 of the Federal Rules of Civil Procedure: "There shall be one form of action to be known as 'civil action.'"

2. Even if the procedure followed by the Government in this case were unique, it would, for the reasons suggested above, be an entirely proper one. That procedure, however, is not at all unique and raises no issues not typically involved in condemnation proceedings. The revocation notice, if valid, was self-executing and operated of its own force to terminate respondent's interest in the property. Thus, the Gov-

ernment was asserting, not that it had a right to terminate the lease which could be exercised in the condemnation action, but that, at the date of condemnation, the lease had already been terminated so that respondent did not then have any interest in the property. The Government's contention, therefore, raised nothing more than the issue of right or title: to whom did the property belong on the date of taking?

a. The issue of right or title, though often not contested, is necessarily implicit in every condemnation proceeding, for the burden is on each claimant to prove his right or title, and thus his right to compensation. The issue of title is most frequently contested, of course, between opposing private claimants to the property, and admittedly such disputes must be resolved by the condemnation court in determining the claimants' respective rights to compensation. *E.g.*, *Eagle Lake Improvement Co.* v. *United States,* 160 F. 2d 182 (C.A. 5), certiorari denied, 332 U.S. 762; *National Refining Co.* v. *United States,* 160 F. 2d 951 (C.A. 8). While such cases may, as the court below suggests (R. 470), take the form simply of a litigation over the distribution of the fund, they are no more than a particular application of the principle that each claimant must establish his right to compensation.

When the dispute over title is between a private claimant and the Government, the principle is no different. The question remains one of determining whether the claimant has any interest in the property, and it is essentially irrelevant whether the interest he

claims would otherwise be in the Government or in someone else. Thus the precise issue in this case was whether respondent had any interest in the property for which he was entitled to be compensated—a question inevitably involved in any condemnation proceeding and which, we submit, must always be determined before compensation can be awarded.

While less common than disputes between private claimants, disputes over right or title between a claimant and the Government in condemnation cases are not infrequent. Yet we know of no case, not governed by state law—other than the decision below—holding that the Government could not assert its title, and have its claim decided, in the condemnation proceeding.[7] The question seems seldom even to have been

[7] The cases relied upon by the court below are not in point. Only two of the federal decisions cited (R. 471) involved condemnation proceedings. The first of these, *United States* v. *Chicago, B. & Q. R. Co.*, 90 F. 2d 161, 171 (C.A. 7), certiorari denied, 302 U.S. 714, was an earlier decision of the court below and contained only a statement that *under Wisconsin law*, which at that time was deemed controlling, a condemnor was required to allege the defendant's title and was bound by that allegation. Even that statement was apparently no more than dictum, since the court went on to show that the Government had, at the trial, made no claim of ownership to the land but had "tacitly acquiesced" in the defendant's claim and that the defendant had in any event adequately established its title. In the second case, *United States* v. *11.48 Acres of Land*, 212 F. 2d 853, 855 (C.A. 5), the court held simply that, in taking an adjacent landowner's riparian rights by condemning in fee the bed of a river, the Government had taken *more* than its dominant servitude over navigable waters and was thus required to pay for what it had taken. To the extent that it is relevant at all, the decision is, in fact, contrary to that below, since the court considered and decided on the merits the Government's assertion of its existing rights in the river.

raised. In at least two courts of appeals, however, the question was expressly raised and discussed, and both are in direct conflict with the decision below.[8]

In *United States* v. *Turner*, 175 F. 2d 644 (C.A. 5), the United States had initiated a condemnation proceeding to acquire land which had once been submerged by navigable waters but which had been filled in by the adjacent landowner, Turner. The United States alleged that the submerged land originally belonged to the state; that the state had deeded it to the United States; that Turner acquired no interest by filling it; and hence that Turner was entitled to no compensation. The district court upheld Turner's title and granted compensation. The court of appeals reversed, holding that title to the filled land was in the United States, but remanded for a determination of what part of the land was fast land. Judge Waller, dissenting in part, argued that the suit, initiated to acquire title by condemnation, had been converted into "a suit to try title" and that the purpose of "confirmation of a title that it already owns seems to me to be so utterly and violently inconsistent with proceedings in eminent domain as not to be permissible" (p. 649). He noted that the Federal Rules were not then applicable (though they are now) and that there was no law or rule permitting "joinder of

[8] While both cases were decided before Rule 71A was adopted, they were decided as a matter of "general" law, as it were, without reference to the particular rules of the local jurisdiction. Inasmuch as the Federal Rules do not deal specifically with the problem, and certainly do not in any way contract the permissible scope of condemnation proceedings, these cases would seem clearly to be valid as precedents.

actions so inconsistent as to be repugnant" (*ibid.*). He further argued that, even if the action was permissible, the burden ought to be on the Government to prove title, as it would be in a suit to try title.

The case thus posed precisely the same issue as that in this case. The majority of the court, however, unlike the court below, expressly rejected Judge Waller's argument (pp. 648–649):

> I do not agree that the nature of this suit as a condemnation suit has ever changed. * * * The primary object was attained of getting immediate and undisputed possession. Any right or title of the United States was not waived, but the United States, I think, stood like any other claimant of the pledged fund. [*] Turner, Alabama and the United States had initially the same burden of identifying what land or interest, if any, each owned. Neither had any presumption as against the other. It did not become a suit in ejectment, or trespass to try title, but remained a condemnation suit with a problem to be solved as to whose land had been taken, the burden being on each claimant to identify his land. The burden of course may shift as the evidence progresses.

The other decision expressly considering the issue is *United States* v. *San Geronimo Development Co.*, 154 F. 2d 78 (C.A. 1), certiorari denied, 329 U.S. 718. The United States had in 1921, under special statutory authority, leased to defendant's predecessor

[*] There was in fact no fund deposited: "While no money was paid into court, the credit of the United States was substituted by the statutes applicable" (p. 648).

for 999 years part of a military reservation in Puerto Rico. The lease, as required by the statute, reserved to the United States the right to "free and unlimited use, without cost," of the land during a national emergency. Upon the outbreak of World War II, the United States asserted its right to use the land, but the defendant claimed that the reserved right had been terminated by a Presidential Proclamation in 1929 (which had conveyed the reversionary interest in the property to the People of Puerto Rico). The United States filed a complaint seeking to acquire by condemnation the "temporary use and occupancy" of the land for the duration of the war, but asserting the right to that use under the original lease. The court of appeals, in an opinion by Judge Magruder, noted the unusual feature of the complaint in that the United States was claiming an existing right to the very use it sought to condemn, but said (p. 83):

> * * * The validity of its claim to the right of free user might be tested by a complaint for a declaratory judgment or by a bill for specific performance of the provisions of the Baker lease, or by some appropriate possessory action. In its petition the United States asked in effect for an adjudication that its right reserved in the Baker lease was valid and subsisting and entitled it to the wartime use and occupation of the premises for naval purposes without compensation to the various persons holding subleases derived from Baker; and, in the alternative, if that claim should be denied, it asked for a judgment condemning an interest in the tract and determining the amounts of just com-

pensation payable to the various respondents named in the petition. Under the peculiar circumstances, there was much good sense in combining these alternative and mutually exclusive theories in a single proceeding, and we are not prepared to say that the procedure followed was inappropriate.

The court then held that the United States was entitled to use of the land under the lease without compensation and directed entry of a judgment so declaring.

Other decisions which conflict in result with the decision below, though the issue was not expressly discussed, are noted in the margin.[10]

b. In addition to being inconsistent with cases directly involving contested issues of right or title, the decision below is based on a misconception of the underlying nature and purposes of condemnation proceedings. The court assumes that a condemnation

[10] *Wittmayer* v. *United States*, 118 F. 2d 808 (C.A. 9): A complaint condemning property patented to defendant and the subsequent accretions thereto from the Missouri River was later amended to allege that the accretions were in the public domain and did not belong to defendant. The issue of title to the accreted lands was tried to the court, which entered judgment quieting title in the United States. The court of appeals affirmed.

United States v. *10,345 Acres of Land*, 50 F. Supp. 470 (E.D. Wash.): In a condemnation proceeding against land claimed as a homestead, the Government was allowed to show that the claimant had failed to make improvements within the time required in order to perfect his homestead title and hence that his inchoate title, being subject to cancellation of his entry at any time, was worthless. The court rejected the claimant's argument, analogous to that of the court below, that the Government was "bound by its deposit [of the estimated value of

proceeding is proper only to take some person's identified interest in property and that the initiation of the action thus necessarily "proclaims" the existence of such an interest. "A condemnation proceeding," however, "is an action *in rem*. It is not the taking of rights of designated persons, but the taking of the property itself." *Eagle Lake Improvement Co.* v. *United States*, 160 F. 2d 182, 184 (C.A. 5), certiorari denied, 332 U.S. 762. For that reason the condemnor is not "called upon to specify the interests that happen to exist." *Duckett & Co.* v. *United States*, 266 U.S. 149, 150–151.

One of the most frequent uses of condemnation, indeed, is simply to perfect a title otherwise acquired—*e.g.*, where the Government agrees to purchase property at an agreed price and then condemns it in order

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the land] and is estopped from contesting defendant's right to secure at least the amount deposited" (p. 472).

Tennessee v. *United States*, 256 F. 2d 244, 256–257 (C.A. 6), is an analogous case demonstrating the flexibility in the use of a condemnation action to permit a federal project to proceed, by the grant of immediate possession, while the rights of the several parties are reserved for determination on the issue of compensation. The state had acquired in fee and deeded to the United States the right-of-way for a highway. A telephone company claimed a permanent easement over the right-of-way for its existing telephone line, while both governments contended that the company had only a permissive right and was required, under state law, to relocate its line so as not to obstruct the highway. To resolve the issue, the United States initiated a condemnation proceeding to condemn all interests in the land that it did not already possess. Without question, the United States was allowed to assert (successfully as to part of the line) both its and the state's rights to require relocation of the line without compensation.

to acquire perfect title. In such cases, there is no need for condemnation to acquire the known interest—the conveyance of which has already been agreed upon—and the sole function of the proceedings is to perfect the title against unknown interests: the "authority of the court is invoked * * * to acquire good title." *Danforth* v. *United States*, 308 U.S. 271, 282–283; *United States* v. *Carmack*, 329 U.S. 230, 239; *United States* v. *Certain Land*, 345 U.S. 344, 348.[11] That use of condemnation proceedings has, moreover, been expressly approved by Congress. Thus, for example, 40 U.S.C. 255 provides that if land to be acquired does not exceed a stated value:

> * * * the title may be accepted subject to such infirmities as, in the opinion of the Attorney General, may, without jeopardizing the interests of the United States, be left for removal by condemnation or other appropriate proceedings, if and when necessary * * *.

In all such cases, the Government is in effect condemning its own property to cut off possible outstanding interests which may or may not in fact exist, and in doing so it clearly does not "concede" the existence of any interest for which compensation must be paid. In this case, condemnation is being used for essentially the same function—to perfect the Government's title against the disputed claim of respondent—and

[11] See also, *e.g.*, *Albrecht* v. *United States*, 329 U.S. 599; *Mahowald* v. *United States*, 176 F. 2d 509 (C.A. 8); *Scott* v. *United States*, 161 F. 2d 1009 (C.A. 6); *United States* v. *Two Acres of Land, etc.*, 144 F. 2d 207 (C.A. 7).

we see no more reason why the initiation of the action here should be deemed an admission of the validity of the claimed interest than it is in other cases.[12]

II

THE LEASE WAS SUBJECT TO REVOCATION IN ORDER TO USE THE PROPERTY FOR AN ARMY MISSILE BASE

A. INTRODUCTION

The second question presented is one of construction of the lease and, more importantly, of the leasing statute—*i.e.*, whether the Government had a right to revoke the lease to use the property for a missile base. If it did, then, on the one hand, the revocation was valid and respondent had no interest in the property. On the other hand, even if there had been no previous revocation (or, as the court below held, the Government was estopped to assert it), the existence of the *right* to revoke the lease for that purpose would have made the respondent's interest of no substantial value. At the date of the taking, it was known that the Government needed the property for a missile base and hence known that, had there been no condemnation, the Government would have promptly exercised its right to revoke the lease. If the Government had that right, respondent's defeasible interest

[12] Also analogous are the cases holding that the Government, in condemning property on which it has erected improvements as a lessee, is not required to pay just compensation for the improvements, *e.g.*, *Searl* v. *School District, Lake County*, 133 U. S. 553; *Bibb County* v. *United States*, 249 F. 2d 228, 230 (C.A. 5). In essence, these cases allow the Government to assert an existing interest in the improvements notwithstanding its condemnation of the property.

was worth only the value of the use of the property during the 60-days' notice that would be required for the exercise of that right—simply a reasonable period in which to vacate the premises, and of no significant value. Thus the question of the scope of the right of revocation is the same whether or not the prior revocation is to be given effect. In short, under our view of the lease and statute, either respondent had no interest in the property (because of the prior revocation) or the defeasible interest it did have was of no substantial value (because of the impending revocation).

The court below held, however, that the lease could be revoked only upon a determination that revocation was "essential for aviation purposes".[13] That hold-

[13] Both courts below, having held that the prior revocation could not be asserted, dealt with the question solely in terms of the effect of the right of revocation on the value of the remaining term of the lease. The district court instructed the jury that the right could be exercised solely for "aviation purposes" and that use of the property as a missile base was not such a purpose (R. 421). Since the evidence disclosed that there was no existing need of the property for "aviation purposes" as thus limited (*e.g.*, R. 432–434), there was, under that construction, little likelihood of the lease being revoked before expiration of the remaining term (2 years and 8 months), and the jury clearly so concluded.

The court of appeals held that the right to revoke was exercisable only "for aviation purposes" but thought it unnecessary to decide whether use of the property as a missile base was within such "purposes" (R. 475). However, since use as a missile base presented the only practical likelihood of the lease being revoked and the jury had obviously based its verdict on the instruction that the lease could not be revoked for that purpose, it was clearly error to affirm the judgment without considering that question.

ing, we submit, was based on an erroneous interpretation not only of the lease itself but also of the authorizing statute.

B. THE REVOCATION WAS AUTHORIZED BY THE TERMS OF THE LEASE

The sole basis for the court's interpretation of the lease was the recitation in its preamble that "it is considered essential that the said airfield * * * be retained in a stand-by status for post-war use in connection with Naval Aviation activities."[14] On its face, however, that statement was simply a recital of the justification for the Department's keeping the property in a stand-by status (by leasing it) rather than declaring it surplus and disposing of it. Under the Surplus Property Act of 1944, in effect when the lease was entered, each military department was required to dispose of any property determined to be "surplus" to its needs. See §§ 3(e), 4, 11, and 23, 58 Stat. 765, 767–769, 777. Thus to justify leasing property not required for immediate use, instead of disposing of it, it was necessary to determine that the retention of the property for future use was essential—a requirement expressly referred to in the new leasing statute passed only a few months after the lease was executed. See Act of August 5, 1947, *supra*, p. 2. The quoted "Whereas" clause was, we submit, included in the lease solely to satisfy that require-

[14] All the relevant parts of the lease are set forth in the Statement, *supra*, pp. 4–5.

ment and was in no way directed to the scope of the reserved right of revocation.[15]

The revocation clause itself (¶ 14), in turn, imposes no limitation of "purpose" but provides, without qualification, that the lease shall be "revocable at will * * * in event of a national emergency and a decision by the Secretary of the Navy that such revocation is essential." The answer to the court of appeals' question, "essential for what?" (R. 473), if one is needed, is to be found not in the unrelated recitals of the preamble but in the directly analogous provision in paragraph 1 that the lease could be renewed for an additional term only if the Secretary found that the property was "not essential for governmental purposes only." The absence from paragraph 14 of the qualifying phrase "for governmental purposes only," whatever its explanation, cannot mean that the power of revocation in paragraph 14 was to be narrower in scope than the power to deny a lease extension under paragraph 1. In view of the complementary nature of the two powers and the substantial identity of their purposes—both being means to recover the property when needed—the most reasonable inference is that they were to be of the same scope. Finally, the fact that *respondent* also was given a totally unlimited power to terminate the lease "at any time" (¶ 1) removes any reason of fairness for reading into the Government's revocation power

[15] In any event, recitals in a preamble are of weight only if the operative provisions are ambiguous and the recitals clear (*e.g.*, *Kogod* v. *Stanley Co.*, 186 F. 2d 763, 765 (C.A. D.C.); *Wilson* v. *Towers*, 55 F. 2d 199, 200 (C.A. 4)), and the opposite is the case here.

any limitation not made express. In our view, therefore, the lease was by its terms revocable for any governmental purpose, and thus could be revoked in order to use the property as a missile base.

It is immaterial that the property was under the jurisdiction of the Navy when the lease was made, while the lease was revoked in order to permit the Army to use the property. The lease was with the "United States," not with the Navy, which has "no separate existence as a legal entity." *Ann Arbor Transp.* v. *United States,* 93 F. Supp. 341 (E.D. Mich.). Nor can the authority for the internal transfer of the property from the Navy to the Army be questioned. See, *e.g.,* 63 Stat. 384, 40 U.S.C. 483(c). The determination that the revocation was "essential" was made by both Secretaries and thus necessarily satisfied the requirements of paragraph 14. That the Secretary of the Navy may have acted at the behest of the Secretary of the Army is likewise immaterial. Cf. *Phillips Petroleum Co.* v. *Johnson,* 71 F. Supp. 791, 792 (D.D.C.).

C. THE LEASE WAS REVOCABLE UNDER THE AUTHORIZING STATUTE

However the terms of the lease itself might be construed, the lease would nevertheless be revocable under the terms of the governing leasing statute. The leasing statutes are unequivocal in requiring that leases thereby authorized be revocable "at any time." The Act of August 29, 1916 (*supra,* p. 2), authorized the Secretary to lease property "for periods not exceeding five years and revocable at any time." The Act of August 5, 1947 (*supra,* pp. 2–3) provided that

each lease "shall contain a provision permitting the Secretary * * * to revoke the lease at any time." It then provided that the revocation provision might be omitted upon a "public interest" determination but that "In any event each such lease shall be revocable by the Secretary * * * during a national emergency."[16] Since the two Acts are substantively the same in all aspects relevant here, it is unnecessary to decide whether the instant lease is controlled by the 1916 Act, in effect when the original lease was executed, or by the 1947 Act, in effect when the lease was renewed for an additional five-year term.[17]

Any right of revocation required to be reserved by the authorizing statutes would, of course, be binding upon lessees taking under them. See, *e.g., Todd Dry Dock & Constr. Corp.* v. *Sumner Iron Works,* 289 Fed. 217, 220 (C.A. 9), certiorari denied, 263 U.S. 700. The right of revocation during a national emergency provided by the 1947 Act, moreover, does not even in form require a revocation provision to be included in the lease, but is operative of its own force.

[16] No claim is made that the Secretary of the Navy made the "public interest" determination necessary to omit the required provision, but since the revocation was during a national emergency it would make no difference in any event.

[17] If the renewal were pursuant to a binding option in respondent, arguably the 1916 Act should govern. However, since the 1916 Act prohibited leases exceeding five years, it would seem that the extension could be given effect only as a new agreement between the parties. The broad power of the Secretary to refuse the extension (see ¶ 1) also suggests that result. For these reasons, it is our view that the 1947 Act is controlling. As already noted, however, there seems no need to resolve that issue.

Thus, whatever scope is given to the right of revocation prescribed by the statutes is necessarily controlling here regardless of the terms of the lease.

Both statutes, in relevant part, provide simply that any leases so authorized are to be revocable "at any time." Language more direct, mandatory, or inclusive would be difficult to frame. That it was so intended is further indicated by the provision of the 1947 Act authorizing the inclusion in such leases of "a right of first refusal in the lessee to purchase the property in the event of the revocation of the lease in order to permit sale thereof" (*supra,* p. 3). That provision necessarily contemplates that such leases may be revoked for the sole purpose of selling the property—that is, even without a public need for the property. See also *Hingham Management Corp.* v. *United States,* 166 F. Supp. 615 (C. Cls.), construing a revocation provision phrased in the exact language of the statute as being "absolute and unconditional."

Such a broad power of revocation is fully consistent with, and, indeed, required by, the purposes of the leasing statutes. The stringent restrictions on the leasing power of the military services is part of the underlying philosophy of requiring them to dispose of, rather than keep on hand or rent, any property that is surplus to their needs. They are not to become landlords managing permanent real estate holdings, but may keep only property which, if not needed for immediate use, may need to be promptly called into service within the foreseeable future. The purpose of the leasing authority was simply to pro-

vide an economical way of keeping essential defense facilities in a state of readiness, or "stand-by," until needed. The very justification for authorizing the retention and leasing of such facilities—*i.e.*, their potentially essential nature—also requires, however, that the Government have maximum flexibility in recalling them into service. The revocable lease permits an interim beneficial use of the facilities, effects their maintenance at minimum cost, and yet keeps them available upon call. The pervading concept, in short, to which the interests of lessees are necessarily subordinated, is the priority of temporarily dormant governmental needs. See, *e.g.*, S. Rep. No. 626, 80th Cong., 1st Sess., pp. 2–8; H. Rep. 623, 80th Cong., 1st Sess., pp. 1–6; 93 Cong. Rec. 9797–9799, 10,492.

In our view, therefore, the statutes, in requiring leases to be revocable "at any time," mean precisely what they say and respondent's lease was, therefore, revocable "at any time" regardless of any qualifications that might be read into the lease terms. Clearly, however, the lease ought to be construed so as to be consistent with the statute—as, indeed, its language seems to require. Under either approach, whether by interpretation of the lease or by force of the statutory commands, we submit that the revocation of respondent's lease in order to use the property for an Army missile base was clearly authorized.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the court of appeals should be reversed and that the case should be remanded to the district court with directions to enter a judgment denying compensation to respondent.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 573

UNITED STATES OF AMERICA, PETITIONER

v.

93.970 ACRES OF LAND, MORE OR LESS, IN COOK COUNTY, ILLINOIS, AND ILLINOIS AIRCRAFT SERVICES AND SALES COMPANY, INCORPORATED, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR ILLINOIS AIRCRAFT SERVICES AND SALES COMPANY, INCORPORATED.

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I.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 573

UNITED STATES OF AMERICA, PETITIONER

v.

93.970 ACRES OF LAND, MORE OR LESS, IN COOK COUNTY, ILLINOIS, AND ILLINOIS AIRCRAFT SERVICES AND SALES COMPANY, INCORPORATED, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR ILLINOIS AIRCRAFT SERVICES AND SALES COMPANY, INCORPORATED.

SUMMARY OF ARGUMENT.

I.

Assuming solely for the sake of argument that the lease could be cancelled for any governmental purpose whatsoever, as asserted by Government, the doctrine of election of remedies forecloses the Government from contending: (1) that it cancelled the lease; and (2) that the lease was cancellable for any purpose other than for Naval Aviation activities. This is so because the Government elected to exercise its power to condemn. It could have instituted a possessory action or other appropriate action to test the meaning of the cancellation

clause in the lease and the efficacy of the cancellation notice. Instead it elected to file a condemnation suit to acquire the condemnee's leasehold interest.

The courts below properly ruled that the doctrine of election of remedies barred the Government from asserting that it had cancelled the lease. However, both the trial court and the Court of Appeals failed to extend the doctrine to its proper scope. They inquired into the issue of the interpretation of the lease. Although they construed it to mean that it could be cancelled only for Naval Aviation activities, as contended for by condemnee, the doctrine of election of remedies, properly applied, should have foreclosed any inquiry at all into the construction of the lease.

Because the Government elected not to contest the meaning of the lease in some action other than condemnation but chose to condemn the interest that lessee claimed in the leasehold estate, the Government under the doctrine of election of remedies could not contest condemnee's interpretation of the lease in the condemnation proceedings.

For this reason the lease must be considered as being cancellable only for Naval Aviation activities, and the Government is foreclosed on this appeal from contending that the lease is cancellable for any other reason.

II.

If the issue relating to the interpretation of the lease is treated as still open, despite the doctrine of election of remedies, the plain language of the lease, the circumstances surrounding its execution, and the actions of the parties demand the interpretation that the lease could

not be cancelled unless the Secretary of the Navy decided that a revocation was essential for Naval Aviation activities. Therefore the courts below properly held that the attempted revocation was ineffective because the proposed use admittedly was for Army Nike anti-aircraft purposes and not for Naval Aviation activities. The lease was in full force and effect at the time the condemnation complaint was filed and the defendant is entitled to just compensation for the then unexpired term of the lease. The Government was not as a matter of law, entitled to a "no value" verdict.

ARGUMENT.

I.

THE DOCTRINE OF ELECTION OF REMEDIES ESTOPS THE GOVERNMENT FROM LITIGATING EITHER THE ISSUE OF CANCELLATION OF THE LEASE OR THE ISSUE OF INTERPRETATION OF THE LEASE, IT HAVING ELECTED TO CONDEMN THE LEASEHOLD INTEREST INSTEAD OF RELYING UPON THE CANCELLATION THEREOF.

The opinion of the Court of Appeals in the case at bar so fully and forcefully presents authorities and reasons for applying the doctrine of election of remedies (R. 467-472) that we deem it unnecessary to burden this Court with a repetition of the cases and argument therein contained. We shall confine ourselves to a discussion of matter and authorities in Government's brief that is not covered by the opinion of the Court of Appeals.

We shall also point out that while the courts below properly held that the doctrine of election of remedies applies, they did not apply it to the full extent warranted by the unique facts in the case at bar. The doctrine should not only foreclose the issue of cancellation of the lease, but also the issue of interpretation of the lease.

The Government, for the first time, relies in this Court upon *United States* v. *Turner,* 175 F. 2d 644 (C. A. 5) as authority for filing a combination condemnation-trial of title proceeding. Insofar as the majority opinion in the *Turner* case may hold that the doctrine of election of remedies is not applicable, it is contrary to the numer-

ous decisions of state and federal courts cited by the Court of Appeals below.

The opinion of Waller, Circuit Judge, (concurring in part and dissenting in part) vigorously speaks out in favor of applying the doctrine (175 F. 2d 649):

> "The Government initially set out towards the goal of acquiring title to the lands by a condemnation suit but now has reversed the field and is trying to run with the ball in the opposite direction. Its assertion that it does not now want condemnation but confirmation of a title that it already owns seems to me to be so utterly and violently inconsistent with proceedings in eminent domain as not to be permissible."

It is submitted that this reasoning, which is the basic foundation of the doctrine of election of remedies, is most persuasive. This Court should approve the dissenting opinion in the case, which clearly expresses itself on the point, and which is in harmony with the cases relied upon by the Court of Appeals below, and should disapprove the holding of the majority opinion in the *Turner* case which presents no sound reason for rejecting the doctrine. For the same reasons the position taken by the Court in *United States* v. *San Geronimo Development Co., Inc.*, 154 F. 2d 78, also relied upon by Government, should be disapproved. Even that case designates the proceedings as an "unfamiliar hybrid".

In a footnote on page 23 of its brief, the Government attempts to distinguish the *Chicago, B. & Q. R. Co.* decision, one of the cases cited with approval by the Court of Appeals below, on the grounds that the Government in that case tacitly acquiesced in appellee's claim of ownership. But in quoting from that case, the Government

left out the balance of the sentence stating that "by instituting the action (the Government) impliedly promised to pay for its value." Likewise, the Government disregards the heart of the paragraph from which it excerpted a part of a sentence; namely, "the petition [condemnation] recites, *as it must*, title and ownership or interest by the defendant, the condemnor is thereby bound by such expressed recognition of title, and cannot be heard to assert the contrary etc." (Emphasis added.) Because under Wisconsin (and Illinois) law the condemnation petition *must* allege title or possessory interest in the defendant, it is immaterial whether the Government acquiesced in appellee's claim in the *Chicago, B. & Q. R. Co.* case, and Government's attempted distinction between that case and the instant case is without merit.

In the same footnote the Government attempts to distinguish *United States v. 11.48 Acres of Land*, 212 F. 2d 853 (C.A. 5, 1954). The distinction is not valid. That case was decided on the basis of election of remedies, and for this reason the Court did not pass upon the issue of whether the United States had exceeded the scope of its navigation servitude.

The election of remedies in the case at bar was not merely an inadvertence on the part of Government. It was a deliberate act. The condemnee had filed a declaratory judgment suit to test the issue of interpretation of the lease but the Government deliberately refused to join issue on the point by filing a motion to dismiss the suit on grounds of immunity from suit. Thereupon the condemnee voluntarily dismissed the suit. (R. 31).

Thereafter the complaint in condemnation was filed. It was unequivocally framed in condemnation, "for the taking of property under power of eminent domain and

for the ascertainment and award of just compensation, if any, to the party in interest." (R. 10). It is true that the complaint recites that notice of revocation of the lease was sent, thereby injecting the implication that the Government might claim possession as of right, but the complaint does not seek a quieting of the title—solely a taking under the power of eminent domain. The order for possession entered the day the complaint was filed ordered a surrender of the property *"to the extent of the estate being condemned."* (R. 26) (Emphasis ours).

It is hard to conceive of a more appropriate situation to which the doctrine of election of remedies should be applied. Confronted with two alternatives, one putting the Government in possession only after adjudication of right to possession and the other immediate possession regardless of right, the Government chose the second alternative and now seeks all the advantage it would have had by pursuing the first alternative. The doctrine of election of remedies was expressly designed to prevent this "eat your cake and have it" result.

50 USC Sec. 171 was originally involved in the case at bar. It was superseded by 10 USC Sec. 2663 which was in effect at the time of the trial. Both statutes were substantially the same in language and required the state law to be followed in condemnation proceedings.

It is indisputably clear from the cases cited by the Court of Appeals below that under Illinois law the doctrine of election of remedies applies to condemnation proceedings. (R. 468-469) Thus, by virtue of these Federal statutes making Illinois law applicable, the doctrine applies to the case at bar.

The Government seeks to avoid the doctrine by contending that Rule 71A superseded 50 USC Sec. 171, and

that at the time the complaint was filed in 1954, when the election of remedies occurred, Rule 71A was in effect.

There is no force to the Government's position because Rule 71A does not refer to the doctrine of election of remedies, which is a matter of substantive law. As the name "Federal Rules of Civil Procedure" indicates, these rules apply only to procedure and do not purport to affect substantive rights. (Notes of Advisory Committee on Rules, 28 U.S.C.A., Rule 71A, 1958 Cumulative Annual Pocket Part, page 323).

Rule 71A merely states in great detail the mechanics of practice and procedure which are to be followed in condemnation—joinder of parties, the form of complaint, the process, the form of answer, amendment of pleadings, etc. To the extent that these detailed mechanics of procedure are in conflict with State procedures, Rule 71A might govern. But this is no argument that the doctrine of election of remedies is controlled by Rule 71A. This rule does not expressly or even inferentially refer to the doctrine, which does not relate to the mechanics of trying the case.

Election of remedies is a matter of substance, and the Government in the footnote on page 18 of its brief so concedes. The *effect* of filing a condemnation suit as an election of remedies is radically a different matter from the *conduct* of a condemnation suit after it has been filed.

50 USC Sec. 171 compelled application of the state law with respect to such substantive aspects as election of remedies, as well as procedural aspects. Rule 71A devoted itself to only procedural aspects and only to that extent superseded the conformity statutes. Rule 71A was not intended to, and did not supersede the substantive

aspects of a number of different condemnation statutes, including 50 USC Sec. 171 (Notes of Advisory Committee on Rules, 28 U.S.C.A., Rule 71A, 1958 Cumulative Annual Pocket Part, pages 323, 324). Therefore, the doctrine of election of remedies, which the Government concedes is a matter of substance and not procedure, remained intact, and is governed by state law.

Use of the enormously persuasive power of the executive branch of Government to obtain, while this case was being litigated, a retroactive repeal of the conformity provision of 10 U.S.C. 2393 (Government's brief, p. 19; 1958 U. S. Code Congressional and Administrative News, p. 6296) must be regarded as futile to affect existing rights. The die was cast in 1954 when the complaint in the instant case was filed and the property of condemnee was seized. The law as it then read worked an election of remedies. Judgment in the trial court, based on that doctrine was entered July 9, 1957. The letter from the Lands Division of the Department of Justice, referred to in the 1958 news service above cited was written in August 1957 and it was not until September 2, 1958 that the deletion of the conformity clause was enacted. This was after the opinion of the Court of Appeals below on July 15, 1958.

Whatever may be the effect of the deletion of the conformity clause upon future litigation not involving the present parties need not be debated. It seems abundantly clear that what took place in 1954 when the Government filed its complaint in this case cannot be affected by Congressional action in 1958.

Even assuming that Federal law and not state law determines the applicability of the doctrine of election

of remedies, the results would be the same. As the Court of Appeals below stated:

> "In our view, we need not be concerned with this question [whether State or Federal law applies] because the reasoning employed by both the Federal and State courts of Illinois leads to the same result." (R. 468)

In addition to *United States* v. *Chicago, B. & Q. R. Co.*, 90 F. 2d 161, (CA 7, 1937), cert. den. 302 U.S. 714, and *United States* v. *11.48 acres*, 212 F 2d 853 (C.A. 5, 1954) which held that the Government was barred from contesting title of the condemnee under the doctrine of election of remedies, the Court of Appeals below relied upon numerous decisions of the Supreme Court of the United States and lower Federal Courts widely applying the doctrine in non-condemnation cases for the purpose of accomplishing justice (R. 468). One of these cases, *United States* v. *Oregon Lumber Co., et al.*, 260 U. S. 290, applied the doctrine against the Government.

The case at bar presents a vivid illustration of the imperative need of such a doctrine in condemnation proceedings if justice is to be accomplished.

When the dispute arose between the parties as to the right of Government to revoke the lease, the defendant took prompt steps to obtain a speedy adjudication of the rights of the parties. It filed suit for declaratory judgment. (R. 31). The Government refused to permit the issues to be adjudicated in that suit by interposing the plea of immunity from suit, whereupon the defendant dismissed its suit without prejudice and prior to any hearing or determination of the issues. (R. 31). In the declaratory judgment action an expeditious adjudication of the issues could have been obtained virtually on the pleadings. Instead the Government resorted to condemnation.

When the Government decided to invoke its powers of condemnation, it forced upon the Courts and the condemnee such a fastastically complicated legal situation that the Court of Appeals below had to write a twenty page opinion to dispose of the issues, during the course of which it stated:

> "Certainly the court was presented with an extraordinary situation; *in fact we doubt if there is one in the books even closely akin to it.* It would be difficult for any court to determine whether each bit of evidence introduced into *such a complicated* situation was proper." (emphasis added) (R. 476)

Now after a jury trial lasting eight days, at which thirteen witnesses testified, with two Government lawyers and two defense lawyers engaged in the trial, with 600 pages of transcript written up and a printed appendix of 459 pages being filed, the Government takes the position that all of the time and energy of the judge, jury, lawyers, court reporter, printer and the enormous cost to the public and the individual litigants are to be flushed down the drain. It was the Government who demanded a condemnation trial, not the defendant. The defendant sought a sensible and inexpensive adjudication of the issues but was unceremoniously precipitated into this protracted trial and subsequent appeals. To contend that it was a futile and meaningless contest is an imposition upon the trial and appellate courts, the jury, the taxpayers, and the defendant who found themselves burdened with complex issues instead of the simple issue that would have been involved if the declaratory judgment action had been accepted by Government as the manifestly rational vehicle to adjudicate the basic contest.

The power of eminent domain is one of the mightiest of the sovereign rights. Seizure of the property is immediate and cannot be resisted by the property owner. Immediate possession cannot be obtained in ejectment or other appropriate action to adjudicate the right to possession. Possession must await a final determination according to the orderly judicial process. It is a shocking proposal that Government advances in the case at bar: that wielding the weapon of eminent domain it can bludgeon the property owner into immediate surrender, destroy its lucrative business, force the thus financially impoverished defendant into a costly trial and then blithely shift its position to that of an ordinary landlord testing its rights under a lease.

Condemnation at best is a harsh necessity imposed upon citizens on the theory of public necessity. The rules of compensation concededly do not always make good all the losses to which the property owner is subjected. It would be the rankest of injustice to superimpose upon a basically harsh situation an additional hardship in the form of a rule that permits the Government to seize the property forthwith upon the pretext of exercising a sovereign power and having received the fruits of such exercise of power refuse to pay for the property on the ground that it was entitled to the property as a matter of right.

It is the primary function of Government to use its sovereign powers to protect its citizens—not as instruments of oppression. It is a misguided perversion of governmental power to use the shield of governmental immunity to avoid a speedy test of rights, to force the defendant into protracted contest on the battlefield of condemnation and then, after Government has been defeated upon a battlefield chosen by it, to seek to retreat to the

battlefield originally tendered by the defendant and rejected by Government.

The Government claims that if the doctrine of election of remedies is held to be applicable to condemnation, governmental land acquisition programs would be hampered. This contention comprises the principal argument advanced by Government in support of its position.

Assuming for the sake of argument the accuracy of the claim, a fair question is raised as to whether the inconvenience of the Government justifies making an exception in the field of condemnation so that the doctrine of election of remedies would apply to all other fields of law except condemnation.

As the Court of Appeals below mentions in its opinion, the essential elements of the doctrine of election of remedies are "(a) the existence of the two remedies; (b) the inconsistency between the remedies; (c) the choice of one of the remedies." (R. 468) All three elements unquestionably exist in the case at bar. Why should an exception to the doctrine be made in this case?

The Government's claim that it will be greatly inconvenienced by the application of the doctrine to condemnation smacks of the familiar cry of expediency which throughout the history of Government has been seized upon in an effort to whittle away personal and property rights of its citizens.

The actual extent to which Governmental land acquisition programs would be hampered, as claimed by Government, is unknown to us, of course, and we have no way of determining it because there is nothing in the record of this case bearing on the subject. From the paucity of Federal decisions involving the doctrine of election of

remedies in condemnation proceedings, it might seem that the number of instances would not be significant and that the Government is indulging in a self-serving argument of the kind which no private litigant can dispute factually because of lack of knowledge.

It would seem, however, that the vast bulk of condemnation cases in which title is contested pertains to disputes regarding which of several claimants are entitled to the condemnation award. (This is conceded by Government at page 22 of its brief.) As the Court of Appeals below points out in its opinion, this type of case has nothing at all to do with the issues in the case at bar (R. 469-470.); and such cases could not be affected if this Court should hold that the doctrine of election of remedies is applicable to condemnations.

Common sense compels one to believe that only isolated instances will occur, if at all, where the meaning of a Government lease is in dispute and the requirements of the Government for possession are so urgent that condemnation must be resorted to instead of a Declaratory Judgment, ejectment or other possessory action. The case at bar would appear to be unique, and the odds are great that a similar factual situation will not arise.

But even assuming that the Government can prove to the satisfaction of this Court that a decision in this case favorable to the respondent would inconvenience the Government in its future land acquisitions, the drastic hardships which would be imposed upon the condemnees if the doctrine of election of remedies did not apply to condemnation proceedings would require a holding that the doctrine did apply. Only such a holding would be consistent with the guarantees of the Constitution and with the basic

philosophy of our democracy under which the Governme is subservient to the best interests of the people.

The constitutionality of the condemnation statutes can be sustained only on the basis that just compensation is awarded to the condemnee. Where the course of action followed by the Government becomes so burdensome to the condemnee that, as a practical matter, he can scarcely afford to assert his legal right to receive just compensation in the condemnation proceeding, he is being deprived of due process of law. The policy of fair play, inherent in our system of law, likewise dictates against rules of law which seriously hamper, and in many cases may well prevent, a condemnee from prosecuting his claim.

Rules of law should be established for condemnation suits which recognize that even financially strong condemnees, when thrown against their will into a contest with the tremendously powerful resources of the Federal Government, frequently come out of the struggle financially scarred. Such rules of law should also recognize that the vast majority of condemnees will be individuals and companies, such as the respondent, of modest financial circumstances. Being suddenly deprived of their homes or their businesses, they have the choice of two unfortunate alternatives—to take what the Government offers them, or to litigate for years through the trial and appellate courts. Those who choose to litigate do so at great personal sacrifice.

Is it too much to ask that the Government consider the condemnee's hardships and that the rules of law applicable to condemnations be established at least on the basis of giving the condemnee an even chance? Why on top of all the other tremendous advantages enjoyed by Government

should the additional advantage be given it of having the doctrine of election of remedies, applicable to all other fields of law, be precluded in condemnations?

At page 11 of its brief the Government states that multiplicity of actions would impose unnecessary burdens both on the courts and the parties, that the combination condemnation-trial of title proceedings advocated by Government works no hardship on the condemnee, and that neither the Court below nor respondent has suggested any reason to require two proceedings instead of one.

This argument is far removed from the realities of life.

The probabilities are that the doctrine of election of remedies will obviate a multiplicity of actions. If the question of title is tried first, a decision in favor of Government will dispose of the matter. A decision adverse to Government will probably result in an amicable agreement on the amount of just compensation, but if there were no agreement, all that would remain would be a trial on the sole issue of compensation.

Before the condemnation trial the Court denied Government's motions to strike respondent's Answer and for summary judgment based upon the claim that the lease had been properly revoked. (R. 3, 4). This legal issue was preserved in the record and could be raised on appeal. The fact thus remains that respondent was forced into a long trial without assurance that it would be entitled to any compensation eventually unless the doctrine of election of remedies barred a contest in the Appellate Courts on the revocation and construction of the lease. Likewise, the trial court had forced upon it an exhaustive trial, which in the absence of the application of the doctrine, might on appeal become a futile waste of time.

In the face of these facts, it is difficult to understand Government's argument that two suits would impose unnecessary burdens on the Courts and the condemnee. On the contrary two suits would be sensible from their point of view in the absence of the doctrine of election of remedies applying to condemnation. Only by applying the doctrine to condemnation does it make sense for the Court to devote its time to a long trial for the purpose of ascertaining just compensation, and only by applying the doctrine to condemnation can the condemnee be protected from being forced into such a trial before he is assured irrevocably that he is entitled to receive at the very least some amount of compensation.

A traditional condemnation trial involving only a determination of the amount of just compensation is an expensive and complicated form of litigation for the condemnee requiring the employment of expert witnesses, the preparation of extensive exhibits and other evidence on the question of value. (In the case at bar, the valuation issues were so difficult that the Court of Appeals below designated this case as extraordinary, doubting whether there is another in the books even closely akin to it. (R. 476))

When the condemnee is assured of at least recovering some amount of just compensation, he is usually willing to undertake the arduous task of asserting his rights in court. But where the right of the condemnee to receive any compensation whatsoever is challenged by Government, the hazards of litigating the condemnation suit may well become overwhelming. It is entirely conceivable that some condemnees, unless protected by the doctrine of election of remedies, may permit their valid claims to go by default rather than get involved in such perilous undertakings. Thus, the Government's position, if adopted, would have

the effect of discouraging individuals from obtaining the just compensation they are guaranteed by the Constitution.

The effort of the Government to criticize the situation as a matter of form and technical pleading discloses a complete misunderstanding of the situation. There are fundamental rights involved.

When a contest over the right of possession is instituted, the person in possession cannot be ousted from possession until the rights of the parties have been adjudicated. Even the Government in a possessory action would not have the right to be put in possession until it has established that right after trial.

The Government's position as claimed owner with right of possession is far different from the Government exercising the power of eminent domain. The exercise of the latter power entitles it to immediate possession leaving only the question of amount of compensation it is to pay for the property taken. It is not merely a difference in form when the Government files an action claiming to exercise the power of eminent domain as contrasted with a pleading asserting ownership and right of possession. As the Court of Appeals below said: "In the same breath, the Government proclaimed and denied defendant's ownership of the leasehold estate. Such an absurd position is not countenanced by law, as we understand it, and neither is it supported by logic, reason or common sense."

It is highly inequitable to permit the Government to reap the benefits (immediate possession) of the exercise of eminent domain and then abandon its sovereign cloak and pursue the course of an ordinary litigant claiming property as a matter of right.

The exercise of the sovereign power of eminent domain is at best harsh in its consequences because it takes property from the owner without his consent. One of the harshest incidents of the situation is virtually instantaneous surrender of possession. The harshness of the situation should not be aggravated by distorting the power of eminent domain to permit the Government to seize possession immediately *in connection with the non-sovereign claim of ownership and possession.*

Condemnee in the case at bar is not a squatter or other person with an ephemeral claim of possessory interest. It has a written lease from the Government under which it operated and maintained the Government's property for seven and one-half years prior to the condemnation.

The substantial claim of right to possession is demonstrated by the fact that two tribunals in this case have already sustained condemnee's claimed right to possession under the terms of the lease.

One of the hardships of which condemnee complains as inherent in a combination condemnation-trial of title proceeding is the sudden death penalty imposed upon the business of a condemnee who has a solid and bona fide claim to possession. The doctrine of election of remedies is his only shield against this unconscionable result for which Government argues in a perverted exercise of eminent domain.

When Government asserts that a double-aspect condemnation complaint works no hardship on condemnee, it completely ignores the tremendous advantage held by a person in actual possession of property from which he is sought to be dispossessed. This is particularly true where he is conducting a business thereon and is entitled by law

to do so until he is dispossessed by formal judgment of ouster in an appropriate proceeding.

The sudden death of a condemnee's flourishing business upon the filing of the condemnation complaint and the immediate entry of the order of possession not only wrecks the business but also does so in such a fashion as to prevent condemnee from liquidating his business assets in an orderly manner which will command highest prices. Instead, all the world knows the business must liquidate and the condemnee can sell his assets only at sacrifice prices. The condemnee is not entitled to recover these substantial losses as part of the condemnation award because just compensation covers only the fair market value of the property condemned.

If respondent's lease had been held to have been validly cancelled in an ordinary possessory action, it would have had an opportunity to liquidate its business assets in the most advantageous manner without the sacrifices inherent in forced sales. Thus, the right to possession until legally ousted by a formal judgment in a possessory or other non-condemnation action is a valuable property right of which condemnee would have been deprived unless the Courts below had held the doctrine of election of remedies precluded the Government from contesting condemnee's right to possession under the lease. In no other way can the constitutional guarantees of just compensation be enforced.

The Government argues its position with regard to the doctrine of election of remedies as if this issue were being adjudicated in a vacuum. But the doctrine is a living principle of the law created by the Common Law through the ages to prevent injustice. What this Court decides with reference to the doctrine will affect the lives of all citizens who may become so unfortunate as to have their property

condemned by the Government in a double-barreled condemnation-trial of title proceeding.

The trial court and the Court of Appeals below recognized the applicability of the doctrine to condemnation, but they failed to extend the scope of the doctrine to the extent required to accomplish complete justice.

They held that under the doctrine the Government was precluded from asserting that it had attempted to cancel the lease.

But they did not hold that the doctrine prevented the Government from contesting the respondent's construction of the lease; namely, that it could be cancelled only for Naval Aviation activities. Instead, in determining the value of the respondent's condemned leasehold interest they considered the lease and agreed with respondent's construction thereof.

It is respectfully submitted that the construction of the lease should not be an issue in this case.

Application of the doctrine would be only a half-hearted gesture towards justice if the Government were on the one hand precluded from urging that it had revoked the lease and on the other hand were permitted to argue that the lease should be construed to authorize a revocation for any government purpose whatsoever. If the Court should determine that the doctrine of election of remedies applies, then we submit, it should apply to the extent of precluding Government from contending for the construction which sanctions revocation for the grounds asserted by Government. The latter cannot elect to condemn and then take the position that it is entitled to the property by virtue of rights asserted on some other basis. *United States* v. *11.48 Acres of Land etc.*, 212 F. 2d 853 (C.A. 5, 1954).

II.

THE REVOCATION OF THE LEASE IN ORDER TO USE THE PREMISES AS AN ARMY ANTI-AIRCRAFT NIKE LAUNCHING SITE WAS NOT AUTHORIZED BECAUSE BY ITS TERMS THE LEASE COULD BE REVOKED ONLY IF THE SECRETARY OF THE NAVY DECIDED THAT SUCH REVOCATION WAS ESSENTIAL FOR NAVAL AVIATION ACTIVITIES.

In the section of its brief discussing the doctrine of election of remedies, the Government demonstrated a complete unawareness of the practical side of life.

Thus, the Government contended that no hardship would be inflicted upon the condemnee if the doctrine of election of remedies were inapplicable to the double barreled condemnation-title contesting proceedings desired by Government. In the previous portions of this brief we endeavored to illustrate how the doctrine is the only salvation for the condemnee in such proceedings and that without its protection he will suffer drastically, even to the extent in some cases of being unable to assert his lawful rights to just compensation because the perils of litigating on the basis desired by Government are so great. When the Government says there is no such hardship, respondent *knows* that the Government is wrong because the respondent was confronted with this hardship in 1954 when it finally decided to risk this litigation in defense of its rights.

In that portion of its brief pertaining to the construction of the revocation clause of the lease and the leasing statutes, the Government goes a step further in demonstrating a complete unawareness of the practical side of life—people's aspirations, motives, business problems and the extent to which they are willing to risk their time, efforts and capital in financial ventures. An awareness of these factors is pertinent to this case because the Navy was

dealing with people back in 1947 when the lease was executed, and was being represented by people. We must assume that Congress likewise knew that the leasing statutes would be worthless in authorizing a successful Naval leasing program unless they authorized contractual arrangements between the Navy and reasonable businessmen which made sense to both.

The Government discusses the terms of the lease as if it were a dead instrument. On the contrary, when it was executed back in 1947 it was a living document representing the hopes and dreams of respondent to develop through its efforts and abilities the vacant hangar and land covered by the lease into one of the largest private flying schools in the United States. (Respondent actually accomplished this during its seven and one-half years of occupancy. (R. 280)). When the lease was executed, the Navy likewise had hopes as well as dreams incorporated into this lease. It hoped that the respondent would preserve and maintain the airport and keep it in good condition during its tenancy so that it would be ready for immediate use by Naval Aviation in case the bad dreams of another war that the Navy then had came true.

When the lease and the leasing statutes are viewed in the light of actual people, all the pieces fall together into a solid, unimpeachable conclusion that the lease can be cancelled only for Naval Aviation activities, and all the contentions to the contrary made by Government in its brief assume their true proportions of unreality.

Assuming that the issue of interpretation of the lease is not foreclosed by the doctrine of election of remedies, as contended for by respondent under Point I of this brief, it is clear that the only construction possible is that

the lease was revocable by the Secretary of the Navy only under the limited circumstances of essentiality for naval aviation purposes.

There is no dispute concerning the purpose which prompted the revocation of the lease. It is conceded by the pleadings and the evidence at the trial that:

(a) The Department of the Army attempted to cancel the lease for Army and not Naval purposes and

(b) That the former Navy Airport covered by the lease was to be used by the Army for anti-aircraft Nike operations and not for any aviation purposes whatsoever.

The Nike is a rocket-powered guided missile used by the Army as an anti-aircraft weapon to shoot down planes. The Nike is launched from ground installations which can be compared to the Army's anti-aircraft gun installations of World War II. In effect, the Nike is a superior type of anti-aircraft gun powered by rockets and guided to the target by electronics. It does not carry passengers as does a plane. It does not need an airport to land and take off of as does a plane; it can be built on any land even though surrounded by obstructions which would prevent flying. Government's asserted answer to the undisputed fact that the Army attempted to cancel the defendant's lease for non-aviation purposes of the Army is that under the terms of the lease, it could be cancelled at any time during a national emergency by any branch or department of the United States Government for any governmental purpose whatsoever. Such an interpretation of the lease requires a complete rewriting of its express terms by Army mandate without the consent of the defendant lessee.

The Government relies principally upon Paragraph 14 of the Navy's lease with respondent which provides (R. 19):

> "It is understood and agreed that this lease will at all times be revocable at will by the government * * * in event of a national emergency and a decision by the Secretary of the Navy that such revocation is essential."

Taking this sentence out of context of the entire lease violates fundamental principles of construction established by the Federal Courts and the Supreme Court of Illinois as well as the Supreme Courts of all the States.

These Courts have repeatedly stated that a contract must be construed as a whole and the intention of the parties collected from the entire instrument and not from detached portions, it being necessary to construe all its parts in order to determine the meaning of any particular part as well as the whole. *Buchanan* v. *Swift,* 130 F.2d 483, 485 (C.A. 7, 1942). *Nice Ballbearing Co.* v. *Lescure,* 227 F.2d 119, 120 (C.A. 7, 1955).

In construing contracts, the Court must give effect to every word or term employed by the parties and reject none as meaningless or surplusage in arriving at the intention of the contracting parties. *Bankers Life Co.* v. *International Telephone & T. Corp.,* 239 F.2d 621, 623 (C.A. 7, 1956).

In Paragraph 14 of the lease, the key word is "essential". That it cannot be construed in a vacuum is perfectly clear from the definition of "essential" in Webster's New World Dictionary which defines the word "essential" to mean "of, or constituting, intrinsic fundamental nature of something". (underscoring added)

When the parties agreed that the lease may be revoked in the event of "A decision by the Secretary of the Navy

that such revocation is essential", it is evident that the parties contemplated that his decision regarding essentiality must relate to something.

The circumstances surrounding the execution of the lease and the terms of the balance of the lease lead to the inevitable conclusion that the parties intended by the use of the word "essential" in Paragraph 14 to relate to the Navy's need for the former Naval Airport for Naval Aviation activities; in other words, that the lease could be cancelled only for Naval Aviation activities.

At the time the lease was executed, the parties were dealing with a Naval Airport, they had in mind only a possible future need of the site for a Navy airport. As stated in the preamble of the lease, the Navy had in mind the possibility of again using the airport only for aviation activities in the case of another national emergency. The preamble to the lease unequivocally states this intention of the Navy as follows:

> "Whereas, the Government is the owner in fee simple of a certain 93.97 acre tract of land, more or less, situated in the County of Cook, State of Illinois, upon which it has developed and operated an airfield and facilities for the activities of the United States Naval Outlying Airfield, Arlington Heights, Illinois; and
>
> "Whereas, because of its strategic value, it is considered essential that the said airfield and the facilities thereon, comprising the said United States Naval Outlying Airfield, be retained in a stand-by status for post-war use *in connection with Naval Aviation activities;* and
>
> "Whereas, during such period, the Lessee desires to lease the airfield and the facilities thereon for use as an airport and for such other uses as may be necessary or incidental to this purpose; and,

"Whereas, the use of the airfield and facilities by the Lessee for such purposes will in no wise be detrimental to the present activities of the Navy Department, but is on the contrary deemed to be in the best interest of the Government." (emphasis ours) (R. 12-13).

This preamble states what the parties specifically had in mind at the time the lease was executed. They were dealing only with a Naval airport—one party to the lease was the Navy, the defendant was a corporation engaged only in aviation and was interested in leasing the property only for aviation purposes. The Navy at the same time was interested in leasing the airport only in such a manner that it would always remain an airport available for Naval Aviation during the term of the lease.

The preservation of this status is accomplished by Paragraph 12 of the lease which specifically prohibits the defendant-lessee from using the property in any way which will limit its usefulness as an airport. Paragraph 12 provides:

"The Lessee agrees that it will prevent any use of the premises and facilities herein demised to its possession, including the construction, erection, alteration or growth of any structure or other object thereon, which would be a hazard to the landing, takeoff or manuvering of aircraft at the airfield, or otherwise limit its usefulness as an airport." (R. 19).*

The granting clause of the lease leased the airport to "the Lessee, to be occupied and used as an airport, and for such other purposes as may be necessary or incidental thereto." (R. 13)

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* The Nike site constructed by the Army since it took possession of the property completely obstructs the landing area and destroys the former airport for flying, as the jury saw on its visit there.

Paragraph 8 of the lease provided that "The Government at its option and discretion reserves the right to use the landing area in a manner that will not interfere with the operations of the Lessee * * *" (R. 17) This paragraph indicates the parties contemplated the possibility of joint flying operations by both Navy and respondent during the term of the lease, making it absolutely conclusive when construed with other paragraphs of the lease that respondent and Navy were thinking only of aircraft and the desire of the Navy to keep the field at all times in shape for flying, whether before or after the Navy might cancel the lease for Naval Aviation activities.

Furthermore, the uncontradicted testimony in the case is to the effect that Congress had cut the appropriations of the Navy at the end of the war and therefore, it had no funds to maintain these types of airfields during peace time operations and desired to lease them rather than declare them surplus so that they could be used again by aircraft in case of another national emergency. (R. 273, 274)

The fundamental error of the Government's brief on this point is that it attempts to vitiate the specific agreement of the parties on the theory that since the lease was with the United States, then it must necessarily follow that any agency of the United States can revoke for any governmental purpose. The parties did not agree to that. The lease specifically requires a decision by the Secretary of the Navy of necessity for Naval Aviation activities. A decision by any agency or person other than the Secretary of the Navy was not specified nor was use for any other purpose by any agency other than the Navy specified. When the parties intended to cover the Government in its broad sense and to vest it with rights and powers they

used appropriate language to that effect. For example, the lease states it is made between "The United States of America" and lessee; it recites the "Government" is the owner in fee simple; that the "Government" leases to lessee; the "Government" shall not be responsible for damages; the "Government" reserves the right to enter for inspection purposes; the "Government" shall have the right to keep certain fire fighting supplies on the premises.

The issue is not whether "Government" can revoke the lease. The genuine issue is over the definition of the conditions under which Government can cancel the lease and for what purpose. The Government raises false issues when it argues on page 34 of its brief that the lease was with the United States and not with the Navy. Paragraph 14 of the lease must be construed together with all of the rest of the lease and the inevitable conclusion is reached that the parties intended that the lease be cancelled by the Secretary of the Navy only if the airport ever again became essential for Naval Aviation. This limitation and specification of a condition precedent cannot be brushed aside.

The Navy obtained under the lease what it bargained for—an experienced airport company which faithfully protected and maintained the airport for the Navy for the seven and one-half years prior to this condemnation.

The respondent is not asking for anything for which it did not bargain and which was deliberately granted to it. It must be presumed that it would not have entered into the lease if it contained an unqualified right of cancellation. As hereinafter more fully explained, respondent's contemplated operation and investment in improvements required an assurance of tenure subject only to the calculated risk that the premises would be needed for Naval Aviation aircraft.

The limited nature of the right to cancel the lease even for Naval purposes is indicated by the fact that the parties deemed it necessary in Paragraph 5 of the lease (R. 16) to make explicit provision for a partial cancellation of the lease and a repossession of the barracks for Naval housing purposes. This was a Naval purpose but it was not a purpose within the scope of the even more limited Naval purpose that the parties had in mind as a condition of the cancellation of the entire lease; namely, aviation purposes. Under the lease the premises could not be repossessed, for example, even for Army housing purposes, in view of the specific language of Paragraph 5 of the lease. In the face of this, the contention that the lease could be cancelled for any and all governmental purposes even those having nothing to do with the Navy Department is clearly without merit.

Further evidence of the intention of the parties appears in the Modification Agreement (R. 21) under which the lessor surrendered its right under Paragraph 5 of the original lease to recapture the barracks for Naval housing. The agreement states "that the Government relinquishes its right to re-enter the barracks building" provided for in Paragraph 5 of the lease. If the plaintiff were correct in its asserted interpretation of the lease the Modification Agreement was a wholly futile and meaningless instrument because it could be nullified at any time by revocation of the entire lease should the Government decide that it needed the demised premises for any purpose whatsoever.

The Modification Agreement was executed on February 9, 1948 a little less than a year after the execution of the original lease. The reserve power of the lessor to recapture the barracks for Naval housing having been relinquished by the Modification Agreement, the lessee acquired the same assurance of tenure with respect to the

barracks as it enjoyed with respect to the balance of the demised premises. Thereupon, in the Spring of 1948, the barracks were converted by the defendant at a cost to it of approximately $30,000 into apartments for housing of the public. (R. 208). Simultaneously, the defendant spent approximately an additional $30,000 in constructing a trailer park immediately adjacent to the barracks building. (R. 210) The Navy approved this construction work prior to its commencement and the Navy thus had full knowledge in advance of the defendant's intentions to invest substantial sums. The expenditure of $60,000 by defendant for permanent improvements with knowledge in advance by the lessor is utterly incompatible with any understanding of the parties that the enterprise was subject to a sudden death sentence. It would be the height of folly to invest such a sum if the lease were revocable upon 60 days' notice by any agency of Government and for any purpose.* The calculated risk which defendant undertook that the premises would not be needed for Naval Aviation aircraft was a reasonable one as borne out by subsequent events. The Navy never did develop any need for the premises for aviation purposes. (R. 434, R. 58) They were appropriated for Army non-aviation purposes.

In the light of the authorized expenditures for permanent improvements undertaken only after modification of the lease to remove a specially reserved threat of recapture, the unqualified power of revocation which Government claims is an absurd and impossible condition and will not be presumed.

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*The defendant developed on the leased premises the largest private flight school in Illinois, and perhaps in the United States, beginning with 1947 when the lease was executed (R. 280). It would be equally foolish to invest substantial funds in planes and equipment, etc., if lease were revocable on basis contended by plaintiff.

As the Court stated in the case of *Aronson* v. *Arakelian, Inc.*, 154 F.2d 231, 233 (C.A. 7, 1946):

> "• • • a contract will not be presumed to have imposed an *absurd* or *impossible* condition on one of the parties, but *will be* interpreted as the parties *must be supposed* to have understood the conditions at the time." (Emphasis ours).

Limiting the cancellation provision of the lease to Naval Aviation purposes mentioned above is consistent not only with the express language of the entire lease and Modification Agreement but is also consistent with the ordinarily understood and long established distinction between the Navy and the Army which existed at the time the lease was executed on May 2, 1947, prior to the passage of the Unification Act.

The Government in the footnote on page 33 of its brief cites *Wilson* v. *Towers*, 55 F.2d 199 (C.A. 4, 1932) and *Kogod* v. *Stanley Co.*, 186 F.2d 763, 765 (C.A. D.C.) for the proposition that recitals in a preamble are of weight only if the operative provisions are ambiguous and the recitals clear.

The defendant has no quarrel with this statement of the law but the facts in these two cases are completely different from the case at bar. There is no inconsistency between the recitals and operative part of the lease in the case at bar. There is an incompleteness concerning the word "essential" in the operative provision and therefore resort may be had to the clearly stated recitals to identify the subject matter to which the condition of essentiality relates.

While the incompleteness of the concept "essential" standing by itself warrants resort to the recitals for

clarification, there is another rule of contract interpretation which compels the recitals to be taken into consideration. In the lease at bar, immediately following the recitals, the lease states:

> "Now, Therefore, *in consideration of the foregoing,* and of the covenants and agreements hereinafter mentioned, the Government * * * acting under the direction of the Secretary of the Navy, does hereby grant, rent, lease and demise unto the lessee * * *." (Emphasis ours) (R. 13)

In *Wall* v. *Chicago Park District,* 378 Ill. 81, 37 N.E. 2d 752 (1941), the court held that such language in a contract unquestionably and unequivocally incorporated the preamble into the operative portion of the lease. In that case the court rejected the contention that recitals in the preamble of a contract had no force and held (page 91):

> "The contract of June 12, 1912, recites that in consideration of the 'premises' and the mutual agreements of the parties, and Sheperd in consideration of the performance by the commissioners of Lincoln Park, of the 'agreements and conditions herein contained,' promised to convey riparian rights. The 'premises' are, without question, the preceding recitals as to the preparation and purpose of the commissioners to construct the improvement 'in substantial compliance' with the 1895 plan. *Defendants' argument that these statements appearing in the preamble of the contract, state merely a proposal of the commissioners, and do not express a covenant by them, is without merit.* * * * *The rule applicable to the facts in the present case is, instead, that preliminary recitals of an agreement become binding obligations when so referred to in the operative portion of the instrument as to show a design they should form a part of it.* (*Trower* v. *Elder,* 77 Ill. 452.)" (Emphasis ours)

In the *Wall* case the transitional phrase was "in consideration of the premises" and the court concluded that "premises" meant the preceding recitals. In the case at bar the transitional phrase is even clearer than in the *Wall* case that the preceding recitals were intended by the parties to be binding obligations upon them. Applying this principle to the case at bar the recitals which refer to the desire of the parties to retain the demised premises on a stand-by basis for Naval Aviation purposes must be resorted to in order to determine what the intention of the parties were with respect to the use of the word "essential" in the cancellation clause of the lease.

The Government contends on page 32 of its brief that the portion of the preamble stating that the airport "be retained in a stand-by status for post-war use in connection with Naval Aviation activities" was simply a recital of the justification for the Navy keeping the property in a stand-by status by leasing it rather than declaring it surplus and disposing of it. After referring to the Surplus Property Act of 1944, the Government states "Thus, to justify leasing property not required for immediate use, instead of disposing of it, it was necessary to determine that the retention of the property for future use was essential . . ."

But this determination was not required by that Act to be made in the leases themselves. From reading that Act it is clear that the determination was an interdepartmental determination made before the Department offered the premises for lease to the public. As far as the Surplus Property Act of 1944 is concerned, there was no need to put into any part of the lease any of the statements actually contained in the preamble. Without any preamble, the lease would have fully satisfied the

Act. The only reason for the preamble was to state the intention of the parties in accordance with the common practice of attorneys generally.

The Government argues (page 33 of its brief) that there is no reason for construing differently the authority to renew (Paragraph 1 of the lease) and the authority to revoke (Paragraph 14 of the lease). There are ample reasons for a difference in construction.

There is a striking difference between the language of the lease in Paragraph 1, which provides a renewal for an additional period of five years upon the same terms and conditions and the language of Paragraph 14 relating to revocation. A renewal is permitted only if in the opinion of the Secretary of the Navy the premises are not essential for "governmental purposes only." The criterion for the renewal privilege by lessee is thus radically different from the cancellation privilege by the lessor. If the Secretary of the Navy regarded the premises as essential for "governmental purposes", then he could block the renewal of the lease. This would not create any hardship upon the lessee because the lessee had the assurance of tenure for an initial five year term. At the termination of that initial period, it understood that the demised premises might be repossessed for governmental purposes. However, if a renewal were permitted, and it in fact was, upon the same terms and conditions as original lease, then the lessee understood that it subjected itself to the same calculated risk of cancellation only in the event that the premises were needed for "Naval Aviation activities." (Second recital). It could not, as a reasonable business proposition, commit itself to another five year term, make arrangements for carrying on its various activities, make commitments to flight students, and purchase new planes and other operating equipment,

if the risk of cancellation were as broad as Government now contends.

In the light of the foregoing analysis of the entire lease, the actions of the parties thereunder and the surrounding circumstances, there can exist no doubt concerning the correctness of our interpretation. However, if there is any shred of doubt, it must be resolved against the Government on the basis of two well-established canons of construction. An instrument must be construed most strongly against its author (*Cedar Park Cemetery Association* v. *Village of Calumet Park,* 398 Ill. 324, 333; 75 N.E. 2d 874). The lease in the case at bar was drafted by Government (R. 271). Also a lease is construed most strongly against the lessor. (*Goldberg* v. *Pearl,* 306 Ill. 436, 440, 138 N.E. 141).

The Government half-heartedly injects into the case the issue that the Secretary of Navy had authority under the law to enter only into leases which are unconditionally revocable. The only authorities cited in support of this interpretation of the statute are *Todd Dry Dock & Const. Corp.* v. *Summer Iron Works,* 289 Fed. 217, Cert. den. 263 U.S. 700, and *Hingham Management Corp.* v. *United States,* 166 F. Supp. 615 (C. Cls.) Neither case is in point. The statute involved in the *Todd* case conferred blanket authority upon the President to cancel contracts for building, production or purchase of ships, which authority was without limitations or restrictions.

In the *Hingham* case the lease provided that it could be terminated "at any time . . . during any national emergency". The lease in the case at bar in its revocation clause is not similarly absolute and all-embracive. The factual situations involved in the *Hingham* case and the case at bar are as different as night and day.

The pertinent statutes have been satisfied by the revocation provision of the lease in the case at bar to the extent that the statutes provide for revocation. The supposed repugnancy to the 1916 Act as well as the 1947 statute is that the cancellation clause imposes certain pre-requisite conditions to the exercise of the right to revoke. This is not a repugnancy, because revocability upon certain stated conditions *consistent with the requirements of the department executing the lease* is still compatible with the requirement of revocability. The statutes do not speak of unconditional revocability. The Secretary of the Navy is given full discretion as to the terms and conditions. Presumably, he is fully cognizant of the needs of his branch of Government and he must necessarily balance his present and potential future need for the premises which he is about to lease with the compulsion to obtain revenue for the Government by leasing property temporarily not needed for use by his department, or to lease property to a lessee who will preserve, maintain and protect the property where the Navy has not been given any appropriation to maintain the property (as in the case at bar, R. 273), or to lease the property without revenue to some lessee who will make a use of it that is beneficial to the country. Under these circumstances, it is reasonable to read into the statutes a power in the Secretary of the Navy to attach certain conditions to his right to cancel the lease so that a lessee would be willing to enter into the lease which he otherwise might reject because the hazard of unconditional power to revoke is too harsh.

The true purpose of the revocability requirement of the statutes is explained in the Senate Committee report and joint Navy Department and War Department letter to the Speaker of the House urging the passage of the 1947

statute. (U. S. Congressional Service, 80th Congress, First Session, 1947, pp. 1592-1599.) A study of this report and letter discloses that the essential purpose of the leasing program was to preserve the temporarily unneeded property in a "stand by" condition so that in case of a national emergency *it can quickly be restored to its former use.* This is demonstrated repeatedly throughout the report and letter and the essence of the program is thus succinctly expressed in the report (p. 1592):

> "While all of these plants may not be adaptable to peacetime uses, as many as possible will be leased to responsible companies which can operate them *without making such changes as to prevent their being rapidly put back into operation in the event of emergency.*" (Emphasis ours)

It is manifest that the revocation which was contemplated was one that would be needed for and would accomplish a restoration of the *status quo* of the property as of the time of leasing. The revocation clause in the lease at bar was in complete harmony with the purpose and intent of the statute. If the necessity arose for a restoration of the demised premises to its previous use as a Naval airport the revocation clause could be exercised and the restoration accomplished. That is the precise meaning of the revocation clause as construed by respondent and as so construed it is impossible to work out any repugnancy to the letter or spirit of the statute.

The statutes merely state that the leases are to be revocable "at any time." They do *not* say that the leases are to be revocable "at any time and for any purpose." The lease in the case at bar was revocable "at any time" within the meaning of the statutes whenever the Secretary of Navy deemed it essential to do so for Naval Aviation activities.

The Government's contention that the court must read into the statutes words which are not expressed therein to the effect that the lease must be cancelled for any reason whatsoever would bind the hands of the Secretary of the Navy in many instances to the disadvantage of the Government. We must remember that these statutes represent the basic statutes authorizing the Secretary of the Navy to lease real estate and personal property. Considering the tremendous variety of such properties, ranging from easily vacated grazing land to multi-million dollar shipyards, the tremendous variety of Naval interests and contracts and functions being performed on behalf of the Navy, it must be presumed that Congress desired by these Acts to give the Secretary of the Navy broad discretionary powers to accomplish successfully his multitude of tasks. Serious repercussions to the Navy's operations unquestionably would arise if this Court were to follow the suggestions made by the Government in its brief, because the whole leasing program of stand-by property would be jeopardized.

In the absence of judicial construction of the statutes, the interpretation placed thereon by Government officials who are charged with its administration are most persuasive. The lease to the defendant was prepared by Government lawyers who were undoubtedly thoroughly familiar with the statutes in question and who were thoroughly familiar with leases prepared pursuant to the authority granted thereunder. It was the Government and not the respondent who prepared this lease (R. 271) and the cancellation clause was put in there at the insistence of Government and for its benefit. The conditions which were incorporated in the lease as a pre-requisite to the exercise of the power of cancellation were considered by the

Secretary of the Navy and the Government lawyers representing him in this matter to be in conformity with the statutes in question.

It must be presumed, since Government drew the lease, that it followed the pattern of leases which the Secretary of the Navy was executing pursuant to statutory authority. His interpretation of his powers under the law are entitled to considerable weight. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 232 F.2d 467, 471 (C.A. 3, 1955) cert. den. 252 U.S. 891, 1 L. Ed. 2d 86.

It would be a travesty on justice for the Government under such circumstances to assert that it did not have power to execute a lease containing such a clause. The prohibition of the statute would have to be so overpoweringly clear in its language as to permit not the slightest doubt concerning its meaning before any court could permit such an outrageous and unjust position to be successfully asserted by Government.

The defendant has no quarrel with the statement that the Navy and Army are part of the United States and that all leases and contracts must be made in the name of the United States and that the Navy or Army are merely acting as representatives of the United States in executing such leases or contracts. However, this fact does not in any way mean that the Navy or Army, acting as a representative of the United States, cannot enter into a lease or contract which binds the United States according to its specific terms and continues to bind it even though the jurisdiction over the contract and lease is transferred to another branch of Government by virtue of the statute cited on page 34 of Government's brief. Neither impliedly nor explicitly is there any provision in the lease

that impairs its continued force in the event of a transfer of jurisdiction over the property from one branch of Government to another. Jurisdiction over the property is manifestly transferred subject to mortgages, leases and all other liens and incumbrances unless a contrary understanding is expressed. Otherwise the door would be open through which the Government could avoid its solemn contractual obligations through the simple device of transferring jurisdiction to another branch of Government.

The issue of transfer of jurisdiction is an utterly false and irrelevant one. The genuine issue is the nature of the rights and obligations defined by lease. These survive any inter-branch transfers of jurisdiction. Under the clear language of the lease the *Government* could cancel only for Naval Aviation activities and this is true whether it is acting through the Navy, the Army, or any other representative agency.

CONCLUSION.

The Doctrine of Election of Remedies estops the Government from litigating either the issue of cancellation of the lease or the issue of interpretation of the lease, it having elected to condemn the leasehold interest instead of relying upon the alleged cancellation thereof.

The attempted revocation of the lease in order to use the premises as an Army anti-aircraft Nike launching site was not authorized because by its terms the lease could be revoked only if the Secretary of the Navy decided that such revocation was essential for Naval Aviation activities.

Under either approach, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 573

UNITED STATES OF AMERICA, PETITIONER

v.

93.970 ACRES OF LAND, MORE OR LESS, IN COOK COUNTY, ILLINOIS, AND ILLINOIS AIRCRAFT SERVICES AND SALES COMPANY, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

In view of respondent's continued reliance on the proposition that there is room in this federal condemnation case for the application of state law, we are setting forth, for the convenience of the Court, relevant statutory materials to which we referred in our opening brief but did not print *verbatim*. These provisions follow in chronological order:

(1) *50 U.S.C. 171*

The Secretary of the Army may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use

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thereof or other interest therein, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, and for the construction and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operations of such plants; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: *Provided,* That when the owner of such land, interest, or rights pertaining thereto shall fix a price for the same, which in the opinion of the Secretary of the Army shall be reasonable, he may purchase or enter into a contract for the use of the same at such price without further delay: *Provided further,* That the Secretary of the Army is authorized to accept on behalf of the United States donations of land and the interest and rights pertaining thereto required for the above-mentioned purposes: *And provided further,* That when such property is acquired in time of war, or the imminence thereof, upon the filing of the petition for the condemnation of any land, temporary use thereof or other interest therein or right pertaining thereto to be acquired for any of the purposes aforesaid, immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes. (Aug. 18, 1890, ch. 797, § 1, 26 Stat. 316; July 2, 1917, ch. 35, 40

Stat. 241; Apr. 11, 1918, ch. 51, 40 Stat. 518; July 26, 1947, ch. 343, title II, § 205(a), 61 Stat. 501.)

(2) *Federal Rules of Civil Procedure, Rule 71A* (effective August 1, 1951):

(a) *Applicability of Other Rules.* The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

* * * * *

(c) *Complaint.*

(1) *Caption.* The complaint shall contain a caption as provided in Rule 10(a), except that the plaintiff shall name as defendants the property, designated generally by kind, quantity, and location, and at least one of the owners of some part of or interest in the property.

(2) *Contents.* The complaint shall contain a short and plain statement of the authority for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification, the interests to be acquired, and as to each separate piece of property a designation of the defendants who have been joined as owners thereof or of some interest therein. Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that

property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned. All others may be made defendants under the designation "Unknown Owners." Process shall be served as provided in subdivision (d) of this rule upon all defendants, whether named as defendants at the time of the commencement of the action or subsequently added, and a defendant may answer as provided in subdivision (e) of this rule. The court meanwhile may order such distribution of a deposit as the facts warrant.

* * * * *

(3) *10 U.S.C. (Supp. V) 2663*

(a) The Secretary of a military department may have proceedings brought in the name of the United States, in a court of proper jurisdiction, to acquire by condemnation any interest in land, including temporary use, needed for—

(1) the site, construction, or operation of fortifications, coast defenses, or military training camps;

(2) the construction and operation of plants for the production of nitrate and other compounds, and the manufacture of explosives or other munitions of war; or

(3) the development and transmission of power for the operation of plants under clause (2).

Proceedings under this subsection shall be in accordance with the law of the State in which the suit is brought.

(b) In time of war or when war is imminent, the United States may, immediately upon the filing of a petition for condemnation under subsection (a), take and use the land to the extent of the interest sought to be acquired.

(c) The Secretary of the military department concerned may contract for or buy any interest in land, including temporary use, needed for any purpose named in subsection (a), as soon as the owner fixes a price for it and the Secretary considers that price to be reasonable.

(d) The Secretary of the military department concerned may accept for the United States a gift of any interest in land, including temporary use, for any purpose named in subsection (a). (Aug. 10, 1956, ch. 1041, § 1, 70A Stat. 147.)

(4) *Act of September 2, 1958,* 72 Stat. 1437, 1565, 1568

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Sec. 33(a) * * *

(14) Section 2663(a) is amended by striking out the last sentence.

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Sec. 33(g) This section is effective as of August 10, 1956, for all purposes.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

MAY 1959.

U. S. GOVERNMENT PRINTING OFFICE: 1959

SUPREME COURT OF THE UNITED STATES

No. 573.—October Term, 1958.

United States, Petitioner, *v.* 93.970 Acres of Land, and Illinois Aircraft Services and Sales Co.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 22, 1959.]

Mr. Justice Black delivered the opinion of the Court.

The basic question presented in this case is whether the United States can have adjudicated under one complaint (1) the claim by a third person of a valuable possessory interest in government property and (2) condemnation and value of that interest, if any. In 1947 the United States leased an airfield to respondent Illinois Aircraft Services & Sales Co. The preamble to the lease stated that because of the strategic value of the field the Government considered it essential to retain it "in a stand-by status for post-war use in connection with Naval Aviation activities . . . ." [1] One paragraph of the lease provided:

> "It is understood and agreed that this lease will at all times be revocable at will by the Government upon presentation of notice of cancellation to the

[1] The preamble reads:

"Whereas, because of its strategic value, it is considered essential that the said airfield and the facilities thereon, comprising the said United States Naval Outlying Airfield, be retained in a stand-by status for post-war use in connection with Naval Aviation activities; and

. . . . . .

"Whereas, the use of the airfield and facilities by the Lessee . . . will in no wise be detrimental to the present activities of the Navy Department, but is on the contrary deemed to be in the best interest of the Government."

> Lessee in writing, sixty (60) days prior to such termination, . . . in the event of a national emergency and a decision by the Secretary of the Navy that such revocation is essential."

In 1954 the Army wanted to use the property for an aerial defense missile (NIKE) site. Timely notice of revocation was delivered to respondent under the signatures of the Secretaries of the Army and Navy, stating that a national emergency declared by the President in 1950 was still in effect and that both Secretaries deemed revocation of the lease essential. Respondent declined to leave the land, claiming that the Government had gone beyond the authority granted by the lease in attempting to revoke it for use by the Army rather than in connection with Naval Aviation activities mentioned in the preamble to the lease.

In order to obtain possession and use of the land as soon as possible—and without waiting to try out the validity of the prior revocation in a separate action or actions—the Government filed a complaint to condemn whatever possessory interest respondent might be adjudicated to have. Although the Government's complaint alleged that it had revoked the lease and, in effect, that respondent had no compensable interest in the property taken, the District Court ruled that by suing for condemnation the United States had "elected" to abandon its prior revocation. On this basis the court found that respondent had a compensable interest and let a jury determine its value. Under instructions that the lease was revocable only if needed for "aviation purposes" and that a NIKE site was not such a purpose, the jury returned a $25,000 verdict for respondents. On appeal the United States Court of Appeals for the Seventh Circuit affirmed this verdict by a divided court. 258 F. 2d 17. It held (1) that the doctrine of "election of remedies" applied and barred con-

sideration of the revocation whether state or federal law governed and (2) that the lease could only be validly revoked under its terms if the Government planned to use the land for "aviation purposes." To review the severe restrictions the court's holding places on the ability of the United States to get, quickly, land it may need for government purposes, we granted certiorari. 358 U. S. 945.[2]

We cannot agree that the lease permitted revocation only if the Government wanted the land for "aviation purposes." It is true that the preamble to the agreement states that the airfield was leased, rather than sold, because it was needed in stand-by status for naval aviation activities. It is also true that immediately following the preamble there is a statement, common in many contracts, that "Now Therefore, in consideration of the foregoing, and of the covenants hereinafter mentioned, the Government" leases the airport. There is no indication, however, either in the lease itself or as far as we have been shown, in the history of the agreement, that this preamble and the formal legal statement immediately following it meant to limit the express, and unequivocal clause of the lease allowing revocation at the will of the Secretary of the Navy in the event of a national emergency. Instead the preamble can be easily understood, in view of the Surplus Property Act of 1944, which required all *surplus* property to be disposed of, as a mere statement of why the property was not considered surplus.[3] In addition the statute which authorized the air-

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[2] The decision of the court below is also in apparent conflict with *United States* v. *San Geronimo Dev. Co.*, 154 F. 2d 78 (C. A. 1st Cir.), and *United States* v. *Turner*, 175 F. 2d 644 (C. A. 5th Cir.).

[3] 58 Stat. 767–770, 777, as amended, 50 U. S. C. App. (1946 ed.) §§ 1612 (e), 1613, 1620, 1632.

port lease, provided that such leases shall be revocable "at any time, unless the Secretary shall determine that the omission of such provision from the lease will promote the national defense or will be in the public interest. In any event each such lease shall be revocable by the Secretary . . . during a national emergency declared by the President." [4] Under the circumstances, we cannot and will not assume that an explicit revocation clause in the lease means any less than it seems to mean. We therefore hold that the revocation was valid and effective.

It follows necessarily from this that application of the doctrine of "election of remedies" would put the Government in an impossible situation. For under the doctrine, the Government must choose either to abandon its power to revoke the lease or to give up its right to immediate possession under condemnation law, a right which is not here questioned. We see no reason either in justice or authority why such a Hobson's choice should be imposed and why the Government should be forced to pay for property which it rightfully owns merely because it attempted to avoid delays which the applicable laws seek to prevent. Such a strict rule against combining different causes of action would certainly be out of harmony with modern legislation and rules designed to make trials as efficient, expeditious and inexpensive as fairness will permit.[5]

Respondents argue, however, that election of remedies is part of the law of Illinois and that Illinois law applies here. We cannot agree with this view. Condemnation

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[4] 61 Stat. 774, 34 U. S. C. § 522a. The current version of this statute is found in 10 U. S. C. (Supp. V) § 2667. We assume without deciding that this statute is applicable although an argument can be made for the applicability of a prior statute. That law provided that leases must be "revocable at any time." 39 Stat. 559, 34 U. S. C. (1946 ed.) § 522.

[5] Cf. *Conley* v. *Gibson*, 355 U. S. 41, 48. See also Fed. Rules Civ. Proc., 1, 2, 18.

involves essential governmental functions. See *Kohl* v. *United States*, 91 U. S. 367. We have often held that where essential interests of the Federal Government are concerned, federal law rules unless Congress chooses to make state laws applicable.[6] It is apparent that no such choice has been made here.[7]

The judgment of the Court of Appeals is

Reversed.

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[6] See, *e. g.*, *Kohl* v. *United States*, 91 U. S. 367, 374; *United States* v. *Miller*, 317 U. S. 369, 380; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363; *Bank of America Nat. T. & S. Assn.* v. *Parnell*, 352 U. S. 29.

[7] Respondents rely on 26 Stat. 316, as amended, 50 U. S. C. § 171, which provided that condemnation proceedings like the one here involved were "to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted." But it is settled that this language required conformity in procedural matters only. See *United States* v. *Miller*, 317 U. S. 369, 379–380 (citing 25 Stat. 94); *Kanakanui* v. *United States*, 244 F. 923; *Nebraska* v. *United States*, 164 F. 2d 866, affirming, *United States* v. *19,573.59 Acres of Land*, 70 F. Supp. 610. And insofar as it required such procedural conformity it was clearly repealed by Rule 71A, Federal Rules of Civil Procedure, at the time this suit was brought. It follows that federal law was wholly applicable to this case. In reaching this conclusion we express no opinion on the possible effect on other cases of the re-enactment of this conformity clause in 70A Stat. 148, 10 U. S. C. (Supp. V) § 2663 (a) (1956), or its subsequent repeal, retroactive to the time of re-enactment, by the Act of September 2, 1958. 72 Stat. 1565, 1568.